University of Southern Queensland

BAD CHARACTER AND PROPENSITY EVIDENCE IN AUSTRALIA: IS THERE A CASE FOR CHANGE AND COULD ENGLAND HAVE THE ANSWER?

A Thesis submitted by

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ABSTRACT

The admission of bad character and propensity evidence in a criminal trial has been a controversial subject for many years, and while Australian jurisdictions have shied away from any major amendments to their legislation, England has made a significant change by inserting amended bad character sections 98, 99 and 101 to 105 into the *Criminal Justice Act 2003* (E & W) Part 11, Chapter I. In doing so, England has allowed the admission of bad character evidence to be introduced more readily through the use of seven gateways. The seven chapters of this thesis represent an in-depth analysis of the effectiveness of the current bad character and propensity legislation in both Australia and England, with a view as to whether the revolutionary amendments to the *Criminal Justice Act 2003* (E & W) should be adopted in some equivalent form in a consistent manner across the various Australian jurisdictions.

CERTIFICATION OF THESIS

I Emma Hudson declare that the Masters of Law thesis entitled *Bad Character and Propensity Evidence in Australia: Is there a case for change and could England have the answer* is not more than 40,000 words in length, The thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Date: 26 October 2022

Endorsed by:

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Student and supervisors' signatures of endorsement are held at the University.

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I cannot wait to close this chapter in my life and begin a new one. Thank you.

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CHAPTER I – INTRODUCTION

For over 100 years the rules on adducing bad character evidence in Australia and England and Wales were virtually identical. In 2003, England and Wales introduced revolutionary legislation which had the effect of making the Crown's task of adducing evidence of a defendant's bad character considerably easier. The reason for writing this thesis is to determine whether Australia should follow suit, to provide some clarity to the complex and antiquated rules of bad character and propensity evidence currently used in Australia.

This thesis will examine both the Australian and English laws on adducing evidence of bad character and propensity. For the purposes of this thesis, the following definitions will be used to aid clarity and for commentary.

England – will be used to cover both England and Wales

Australia – covers both the 'common law' and uniform evidence legislation.

'Common Law' states – refers to Queensland, South Australia, and Western Australia

Bad Character – includes prior convictions and credibility. A specific form of bad character evidence is propensity evidence.

Propensity evidence – the terms 'similar fact' evidence, 'tendency' evidence and 'coincidence' evidence are considered synonymous to 'propensity' evidence in this thesis.

Whereas England has one criminal law jurisdiction, Australia has nine criminal law jurisdictions because criminal laws are not included in section 51 of the Australian Constitution which sets out the powers of the Commonwealth. Australian jurisdictions originally fell under the same evidence rules imported into Australia by virtue of England's *Criminal Evidence Act 1898*. However, in 1995, the nine Australian states and territories began to split apart in their treatment of evidence law with the creation of the Uniform Evidence Legislation (UEL). Chapter I explains the UEL was enacted in the hope that all the states and territories would join and create one unified evidence regime, however, this has not happened. While the Commonwealth, States and Territories of New South Wales, Victoria, Tasmania, Australian Capital Territory, and the Northern Territory decided to enact the UEL, the common law states of Queensland, South Australia and Western Australia have chosen not to join the UEL regime.

The term ‘common law’ states is used in this thesis because whilst each of Queensland, South Australia and Western Australia have their own Evidence Acts, they largely follow the common law, as opposed to the UEL, which has sought, in part, to codify the rules of evidence.

This thesis focuses on the possible need for reform of the rules surrounding the admission of bad character evidence, as well as combining such reform with a common test for the admission of propensity evidence with the overall aim of assisting to reduce Australian rates of recidivism.

Laws associated with adducing bad character and propensity evidence inherited by the adoption of the *Criminal Evidence Act 1898* (England and Wales) were consistent in Australia until 1995, when the UEL was enacted, and more recently when South Australia and Western Australia statutorily overruled the common law test for the admission of propensity evidence, as seen in table 1. As to the latter, though the reasoning behind these decisions varies, there is one common thread: to lower the difficulty for the Crown to adduce propensity evidence.

Comparative history of bad character and propensity evidence between England and Australia

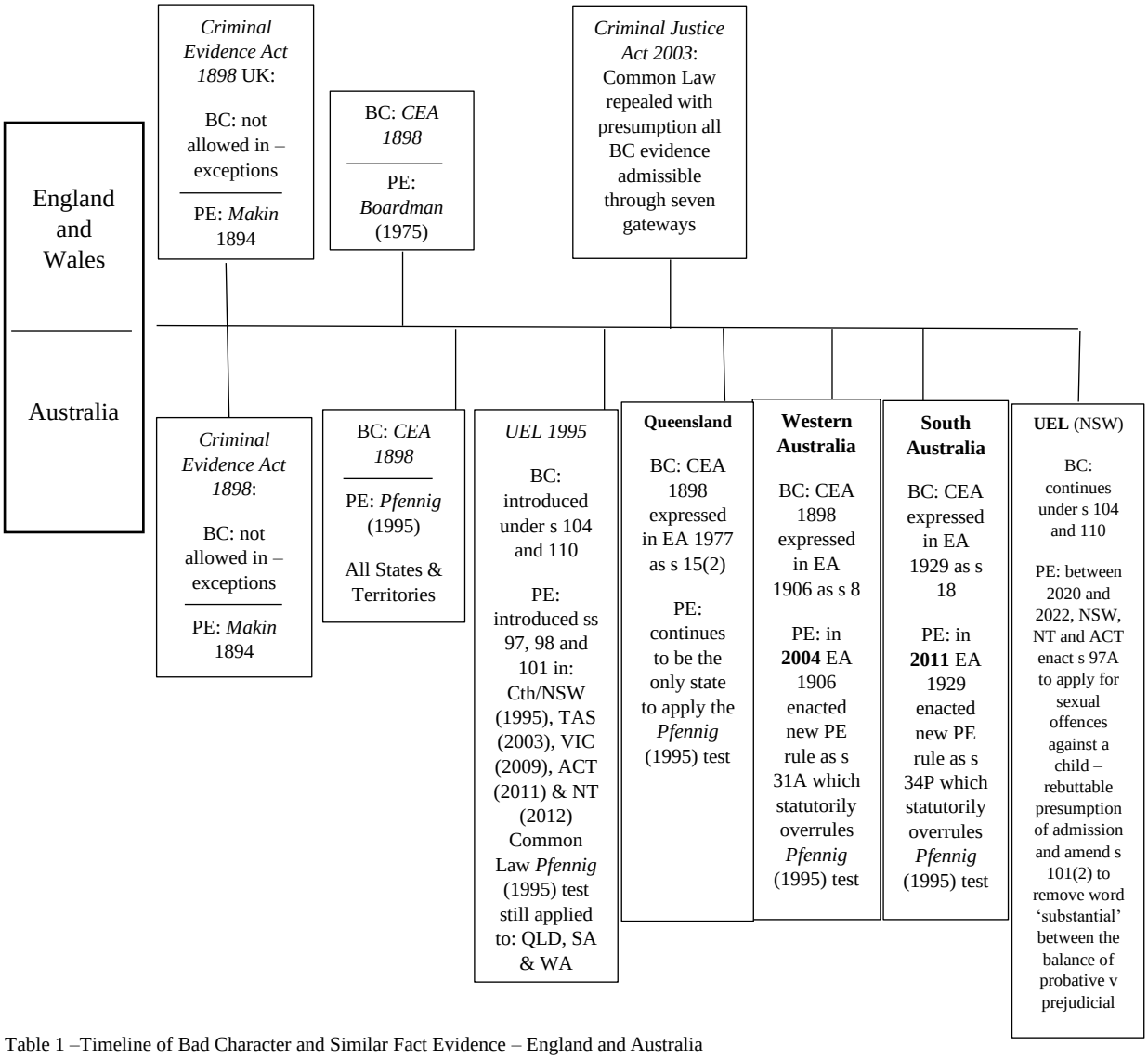

Table 1 –Timeline of Bad Character and Similar Fact Evidence – England and Australia

CEA – Criminal Evidence Act; UK – United Kingdom; BC – Bad Character; PE – Propensity Evidence; UEL – Uniform Evidence Legislation; EA – Evidence Act

It can be seen from the above diagram that England has a simplified and unitary system for dealing with bad character and propensity evidence following the passage of the *Criminal Justice Act 2003* (England and Wales). Conversely, Australia's federal system has seen the treatment of bad character and propensity evidence become both diverse and fragmented.

The research methodologies used in this thesis are as follows. Chapters II, III, VI and VII apply a doctrinal research methodology and comparative inquiry. Chapter IV applies a reform-oriented research methodology whereas Chapter V applies a theoretical research

methodology. Doctrinal research is defined as being 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'[1] Reform-oriented research is described as 'research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting.'[2] The final methodology that was used, theoretical research, has been described as 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.'[3]

The structure of this thesis will be as follows. Chapter II provides an overview and discussion of the bad character evidence rules in Australia. It explains the differences between the 'common law' and the UEL States and Territories as well as the similarities. Chapter III examines the propensity evidence rules in Australia by discussing the five different tests of admissibility currently in use. Chapter IV examines England's bad character and propensity rules, and how and why they amended their legislation in this area of evidence law in 2003. Chapter V discusses jury prejudice and the impact of recidivism in England since the 2003 amendment. Chapter VI compares the differences between Australia and England on bad character and propensity evidence as well as recidivism, while Chapter VII concludes this thesis.

[1] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What we do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 101.
[2] Ibid.
[3] Dennis Pearce, Enid Campbell, and Don Harding ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) cited in Terry Hutchinson, *Researching and Writing in Law* (Reuters Thomson, 3rd ed, 2010) 7.

CHAPTER II – BAD CHARACTER EVIDENCE IN AUSTRALIA

"People do not seem to realise that their opinion of the world is also a confession of their character"

– Ralph Waldo Emerson

A *Overview*

This chapter sets out the bad character evidence provisions used throughout Australia, distinguishing between the 'common law' states and the 'UEL' states. This analysis gives insight into how the current Australian rules for the admission of bad character evidence operate.

Unlike the *Criminal Justice Act 2003* (England), bad character and propensity evidence rules in Australia are treated separately in their application by the courts. With bad character evidence, the Crown is prevented from adducing such evidence unless either the defence adduces evidence of the defendant's good character or attacks the character of a Crown witness. In other words, the onus is on the defence and the Crown must stay its hand until the defence reveals its case strategy. However, the situation is different with propensity evidence where the Crown can take the initiative, irrespective of the defence case strategy, and seek leave to adduce propensity evidence by satisfying the relevant test depending on the particular jurisdiction. Whilst Australia continues to treat the rules for the admission of bad character and propensity evidence separately, the English Government made the decision to amend and combine the admission of bad character and propensity evidence in 2003 with the *Criminal Justice Act*. Further discussion of England's position will be discussed in Chapters III and IV, while Australia's propensity evidence rules will be undertaken in Chapter II.

All jurisdictions in Australia followed the English 1898 legislation on bad character until 1995 when the UEL legislation was enacted by the Commonwealth and New South Wales (since joined by Tasmania, Victoria, Australian Capital Territory and Northern Territory). Only Queensland, South Australia and Western Australia retain the language of the 1898 English legislation.

Due to the 'common law' jurisdictions of Queensland, South Australia and Western Australia using similar language to the 1898 English legislation, Queensland will be analysed in detail as being indicative of the equivalent sections of the other two common law jurisdictions of South Australia and Western Australia (set out in Appendix A).

B *Understanding Bad Character Evidence*

Evidence of a person's character can either be described as 'good' or 'bad'. Good character can be considered as being "good tempered, thoughtful, generous, well-spoken, truthful or reliable"[4] whereas bad character would be the opposite as in "bad-tempered, violent, angry, sullen, foul-mouthed, untruthful or unreliable".[5] The distinction between good and bad character was described in the case of *Melbourne v The Queen*,[6] where McHugh J summarised the differences by stating:

> …the common law has drawn a distinction between…..evidence of good and bad character…evidence of good character is readily admitted because it…prove[s] that the accused is unlikely to have committed the crime in question. Evidence of bad character is admitted only in 'exceptional circumstances'.[7]

However, bad character evidence can be admitted, in all Australian jurisdictions, where the defence has put the defendant's good character into evidence although it is recognised that such a defence tactic is unlikely to work if the defendant has a criminal record.

Bad character evidence can be highly prejudicial and if able to be adduced by the Crown, the jury, despite warnings from the trial judge, may give the bad character evidence greater weight towards its verdict of innocent or guilty rather than concentrating on more probative evidence. Jury prejudice will be discussed further in Chapter V.

The common law and UEL regimes, both have provisions for adducing evidence of bad character, which is depicted in table 2. While Queensland,[8] South Australia[9] and Western Australia[10] continue to broadly follow the common law, the remaining states and territories of New South Wales[11], Victoria[12], Tasmania[13], the Australian Capital Territory[14] and the Northern Territory[15] follow the Uniform Evidence Act, as does the Commonwealth.[16] Both regimes have their origins in the *Criminal Evidence Act 1898* (England and Wales) Chapter 36 which stated:

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[4] Andrew Hemming and Robyn Layton, *Evidence Law in Qld, SA and WA* (2017) Thomas Reuters, 345 [6.05].
[5] Ibid.
[6] (1999) 198 CLR 1, 16.
[7] Ibid at [36].
[8] *Evidence Act 1977* (Qld).
[9] *Evidence Act 1929* (SA).
[10] *Evidence Act 1906* (WA).
[11] *Evidence Act 1995* (NSW).
[12] *Evidence Act 2010* (Vic).
[13] *Evidence Act 2001* (Tas).
[14] *Evidence Act 2011* (ACT).
[15] *Evidence Act 2012* (NT).
[16] *Evidence Act 1995* (Cth).

1. Competency of witnesses in criminal cases

(3) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless-

(i) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) He has personally or by his advocate asked questions of the witness for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) He has given evidence against any other person charged with the same offence.

England reformed this legislation in 2003 with the passage of the *Criminal Justice Act 2003* (England) which is discussed in Chapter IV.

As will be seen in the next section, the 'common law' states of Queensland, South Australia and Western Australia employ similar language to the *Criminal Evidence Act 1898* (England and Wales) above and is reflected in section 15 of the *Evidence Act 1977* (Qld), section 18 of the *Evidence Act 1929* (SA) and section 8 of the *Evidence Act 1906* (WA) (see table in appendix A). The Queensland legislation will be examined in detail illustrative of the approach for admission of bad character evidence.

C *Evidence Act 1977 (Qld) – Section 15*

Section 15 of the *Evidence Act 1977* (Qld) (see Appendix A) broadly reflects the language of section 1(3) of the *Criminal Evidence Act 1989* (England), which sets out the rules when the person charged during a criminal proceeding can be cross-examined as to bad character and is known as 'common law'. The common law system in Australia has been developed over time by judges on a case-by-case basis, which builds onto the precedent and interpretation of earlier court decisions.

Subsection 15(1) states that where a charged person gives evidence, he or she cannot refuse to answer questions that relate to the current charge. Where the defendant has chosen to take the stand and give evidence, they cannot avoid answering questions which may incriminate them, provided these questions relate to the current charge.

The effect of section 15(2) is the defendant, if giving evidence, is not required to answer any questions which may reveal prior offences unless the exceptions of section 15(2)(a)-(d) are satisfied and meet the 'exceptional circumstances' requirement that McHugh J discussed in *Melbourne*.[17] Section 15(3) further states the court's permission is required for questions to be asked under the exceptions 15(2)(a)-(c), and subsection 15(4) states that the court's permission, under subsection (3), must be made in the absence of the jury.

The purpose of subsection 15(1) of the *Evidence Act 1977* (Qld) is to 'focus on the offence with which the person is charged'.[18] This means that should the defendant take the stand, the prosecution can only ask questions which relate to the relevance of the offence charged and the defendant cannot refuse to give this evidence even if it may incriminate him or her which is reflected in the exceptions listed in subsections 15(2)(a) and (b). Focusing on the offence charged, it prevents the defendant from avoiding answering questions relevant to the offence charged, while at the same time, restricting the Crown to a specific area of the defendant's bad character.[19] Any admissions made while the defendant is under cross-examination are considered voluntary in order to 'prevent frustration' of section 15(1).[20] However, cross-examination under this subsection must not be allowed to degenerate into a general attack on character.[21] Should the Crown wish to lower the shield and adduce evidence of bad character, it would need to fall into one of the exceptions found in section 15(2)(a)-(d).[22]

There are minor differences between Queensland and South Australia and Western Australia regarding the limited exceptions where evidence of good character is adduced. These differences include using the term 'any other person charged with the same offence' in South Australia and Western Australia[23], whereas Queensland refers more broadly to 'a person charged in the same proceeding' under section 15(2)(d).

The good character exception under section 15(2)(c) was addressed by the High Court in *Phillips v The Queen,*[24] where leave was given to the prosecution to cross-examine the appellant on his previous convictions involving dishonesty after attacking the character of the victim as a user of cannabis. The appellant's explanation as to how his fingerprints came to be on the victim's flyscreen on a window in her house involved her allegedly having contacted

[17] *Melbourne v The Queen* (1999) 198 CLR 1, 16 [36].
[18] Hemming and Layton (n 4) 361 [6.85].
[19] Ibid.
[20] *R v Gudgeon* (1995) 113 ALR 379, 247.
[21] *R v Slack* [2003] NSWCCA 93.
[22] *Evidence Act 1977* (Qld) s 15(2), *Evidence Act 1929* (SA) s 18(1)(d) and *Evidence Act 1906* (WA) s 8(1)(e).
[23] *Evidence Act 1929* (SA) s 18; *Evidence Act 1906* (WA) s 8(1)(e). They do not clearly extend to defence character witnesses, however, Queensland does in s 15(2)(b).
[24] (1985) 159 CLR 45.

him to purchase a quantity of cannabis, and he allegedly sought access to discuss the deal. The prosecutrix denied any such conversation or deal and the allegation that she was a cannabis user was accepted by the court as an attack on her character. The operation of subsection 15(2)(c) was described in *Phillips* by Dean J at [2] in the following terms:

> The effect of subsection 15(2) is not to make cross-examination automatically allowable... but to remove the prohibition upon such cross-examination with the consequence that whether such cross-examination should be permitted…is a matter for the discretionary decision of the trial judge. Any room for doubt that the overall effect… is so limited is removed by the overriding proviso, in subsection 15(2)(c), that 'the permission of the court to ask any such question must first be obtained'. That proviso makes plain that cross-examination… as to credit, remains forbidden unless the judge is persuaded that, as a matter of discretion, it should be allowed.

Using evidence of bad character under section 15(2)(c) is only relevant to credit and therefore the judge, "should tell [the jury] quite plainly that the fact of a prior conviction can only be used as a means of discrediting the accused… [where there is] conflict in his evidence with witnesses for the Crown".[25] Whether the jury follows this direction and does not allow prejudice against the accused to affect its verdict is further investigated in section C in Chapter V.

Section 15(2)(d) is the exception which allows cross-examination of a defendant's prior convictions or bad character should he or she give evidence against any other person charged in that criminal proceeding. However, unlike sections 15(2)(a), (b) and (c), leave of the court is not necessary. This differs from section 104(6) of the UEL where leave of the court is required to adduce bad character evidence of another co-defendant.

At common law, the right to cross-examine an accused is more limited than the right to cross-examine a witness generally[26] and while the common law requires that evidence of good character and evidence rebutting good character be given in general terms without reference to specific experiences or events, this principle is not strictly enforced.[27] Under the UEL, the common law rule that character evidence must be limited to evidence of general reputation is abrogated and is found in section 110, which is discussed in the next section.

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[25] *Donnie v The Queen* (1972) 128 CLR 114, 123 (Barwick CJ).
[26] Queensland Law Reform Commission, *Review of the Uniform Evidence Acts* (Report No 60, September 2005) 203 [6.96] ('QLRC').
[27] Ibid 204 [6.98].

D *Uniform Evidence Legislation 1995 (Cth)*

Section 104 of the UEL (Cth) deals with the cross-examining of a defendant, and section 110 deals with the admissibility of a defendant's character evidence. These sections cover the same legal territory as section 15 of the *Evidence Act 1977* (Qld).

Section 104 (see Appendix A) provides that the defendant may be cross-examined on his or her credibility, but only under limited circumstances and with the leave of the court, as set under section 112.[28]

Section 104(4) provides that leave to cross-examine a defendant as to his or her credibility must not be given unless evidence adduced by the defendant has been admitted, it proves a prosecution witness's tendency to be untruthful and is relevant solely or mainly to the witness's credibility.[29]

Where there are co-defendants, section 104(6) provides that where evidence has been given, by a co-defendant, 'adverse to the defendant seeking leave to cross-examine', can be cross-examined, provided leave of the court is given.[30] This is consistent with Queensland's section 15(2)(d) of the *Evidence Act 1977* (Qld).

The difference between section 15(2) and section 104 is predominantly the wording of the legislation and the omission of evidence of the character of the accused person which is found in section 110. Section 104(5) fulfils a similar purpose to section 15(2)(a) of the *Evidence Act 1977* (Qld) in excluding events in relation to the current charges the defendant is facing. The provisions under the UEL states and territories are considered generally more prescriptive in regards to the circumstances in which a defendant can be cross-examined as to his or her credit or character,[31] and varies the common law's 'all or nothing' approach to character evidence.

Section 110 (see Appendix A) reflects the common law and permits the defence to adduce evidence to prove the defendant's good character, either generally or in a particular respect, and if such evidence is admitted, the prosecution may adduce rebuttal evidence.[32]

Regarding evidence of good character in a particular respect, the type of evidence the prosecution may adduce in rebuttal, is limited by the type of evidence adduced by the

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[28] *Uniform Evidence Legislation 1995* (Cth) s 112 states: A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave as set out in the QLRC (n 23) 197 [6.76].
[29] QLRC (n 26) 199 [6.84].
[30] Ibid 196 [6.75].
[31] Ibid 204 [6.101].
[32] Miiko Kumar, Stephen Odgers and Elisabeth Peden, *Uniform Evidence Law: Commentary and Materials* (2015) Thomas Reuters, 503 [12.10].

defendant.[33] This can be seen to replicate the meaning of section 15(2)(c) *Evidence Act 1977* (Qld) in Chapter II section C and echoes the language from the *Criminal Evidence Act 1898* (England) discussed in Chapter II section B.

In proving good character, section 110(1) is an exception to the four exclusionary rules of hearsay, opinion, tendency and credibility for defence evidence which may prove that the defendant is 'a person of good character.' This section permits the defence to introduce evidence that the accused; (a) Is said to be a good person, such as a character reference or evidence of a person's reputation (including remote hearsay); (b) Is judged to be a good person, for example by a person (whether an expert or not) who has dealt with or read about the defendant; (c) Has done good things or has a good nature (with no requirement to comply with the notice or significant probative value requirements in section 97), for example, the defendant's lack of a criminal record; and (d) Is credible in a variety of ways - whether or not the defendant's credibility has been attacked first, and even if that evidence would not substantially affect the assessment of the defendant's credibility - for example, occasions when the defendant has been honest in the past.[34]

Generally, it is held that there must be a subjective intention on the part of the defendant to adduce evidence of good character for the purpose of supporting an inference that he or she is not guilty of the crime charged and/or supportive of the defendant's credibility.[35] Section 110(1) is considered broad because it covers both "direct evidence of good character, evidence that proves good character 'by implication', and evidence of good character in general or 'in a particular respect.'".[36] It may include such aspects as 'gentleness or generosity' or consider good character in particular contexts, such as in the workplace or with children.[37]

In *R v Ciniccola*,[38] the defendant was on trial for murdering his neighbour over a fencing dispute. Section 110(1) was considered when a letter from the defendant's other neighbour, with whom the defendant had a similar dispute, was used to show that during their dispute, an amicable settlement was reached and therefore the defendant did not have a 'tendency to kill people with whom he had had fencing disputes.'.[39] Harrison J however, excluded other claims

[33] For example: Should the defendant lead evidence of good character generally, the prosecution can only adduce evidence to prove bad character generally. The same goes for evidence adduced by the defendant of good character in a particular respect, only evidence of bad character, in a particular respect, may be adduced by the prosecution. As cited in Australian Law Reform Commission, Review (2005) [6.78].
[34] Jeremy Gans and Andrew Palmer, *Uniform Evidence* (2014) Oxford University Press, 251 [12.3.1].
[35] Kumar, Odgers and Peden (n 32) [12.10].
[36] Gans and Palmer (n 34) [12.3.1].
[37] *Bishop v The Queen* [2013] VSCA 237 [8].
[38] [2010] NSWSC 1554.
[39] Gans and Palmer (n 34) [12.3.2].

in the letter on the basis of lack of relevance and risk of unfair prejudice. In *R v Rihia* [2000] VSCA 235 where, by virtue of the defence adducing evidence that the defendant had never struck his children, the prosecution became entitled to introduce evidence of previous abuse of his wife.

If evidence is only admitted to prove the defendant is someone of good character in a 'particular respect', evidence of rebuttal must only be limited to that 'particular respect'. [40] For example, should a defendant who was charged with assault introduce evidence to prove he is not violent, any prior convictions, such as a fraud offence, would be inadmissible in rebuttal. Given that evidence of good character (and rebuttal evidence) may be limited under the Act to a "particular respect" of the defendant's character, it is clear that any judicial discretion to the jury will be limited to that particular respect.[41] In *R v Zurita*,[42] the court considered the raising of character in a "particular respect" where Howie J at [14] stated that "it is clear that the effect of subsection 110(1) was to vary the common law attitude to character, which was, as the trial judge expressed it, "all or nothing". The judge noting section 110(1) gave the accused a clear choice [that] he could put in issue the proposition that he was "generally a person of good character" or alternatively, could put in issue the proposition that he was "in a particular respect a person of good character".

The same four exceptions that apply to section 110(1) (the hearsay, opinion, tendency, and credibility rules) also apply to section 110(2) and (3) in that 'if evidence is admitted to prove that the defendant has a good character, then they also apply to evidence that the defendant is not of good character'.[43] The rationale behind subsection 110(2) and (3) was explained by the Australian Law Reform Commission (ALRC) who said:

> if the accused has led evidence tending to prove that he is not the kind of person who could commit the crime he is charged with, the prosecution must be permitted to rebut this evidence, or the tribunal of fact might be left with a totally misleading impression of the accused. Where the evidence of the accused's good character has been confined to his character in a particular respect, the evidence of bad character or prior conviction in rebuttal should be confined to such evidence as tends to disprove his good character in that respect..[44]

[40] Kumar, Odgers and Peden (n 32) [12.10].
[41] Ibid.
[42] [2002] NSWCCA 22.
[43] Gans and Palmer (n 34) [12.3.2].
[44] Law Reform Commission, *Evidence* (Report No 26, 1985) vol 1, [803].

The table below demonstrates the admission of bad character evidence in Australia. Should the prosecution wish to adduce this evidence, these questions need to be answered and the evidence falls into the respective test or exception.

The Admission of Bad Character Evidence in Australia

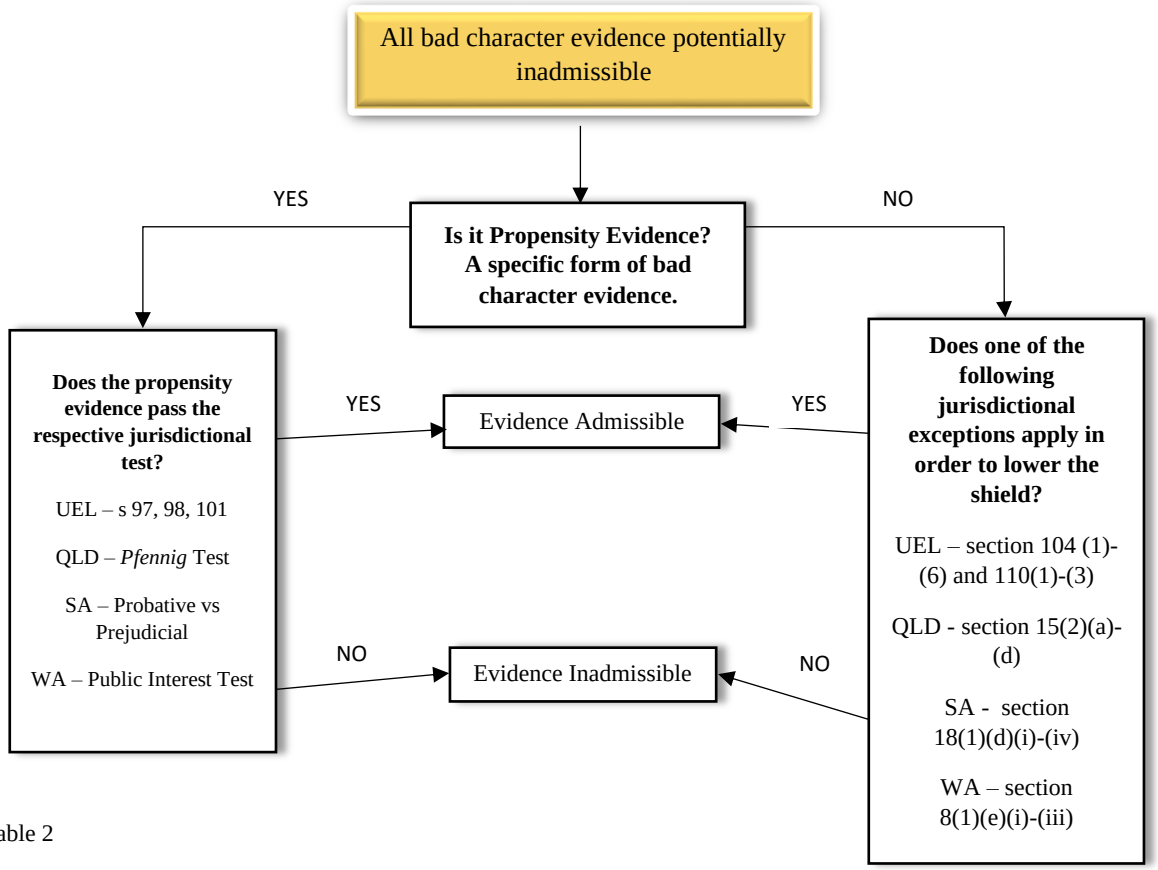

Table 2

If the evidence does not fall into one of the tests or exceptions, it will not be admissible. Propensity evidence depicted in the left-hand side of table 2 will be further discussed in Chapter III, Propensity Evidence in Australia, which will explain in detail the jurisdictional tests and what must be met for propensity evidence to be adduced.

E *Discussion*

The UEL overrules the common law by distinguishing between situations where the defendant *has* adduced evidence that he or she is 'generally a person of good character' or situations where the defendant has led evidence to prove that he or she *is* 'a person of good character in a particular respect'.[45] This difference is important because it depends on the willingness of the court to regard certain aspects of the defendant's character as distinctive from more 'general' aspects.[46] In *Hughes*,[47] the judge ruled that the statements by the accused were more 'assertions' regarding his lack of violence towards his daughter and lack of interest in pornography, and therefore could be rebutted by evidence that he had accessed and possessed pornography.[48]

Section 110 of the UEL mirrors in part the effect of subsection 15(2)(c) of the *Evidence Act 1977* (Qld). In section 110(1), four rules do not apply: namely the hearsay rule[49], the opinion rule[50], the tendency rule[51] and the credibility rule.[52] However, these four exception rules do not apply if the evidence is 'adduced by the defendant' to prove he or she is of good character.

Section 110 of the UEL is similar to that part of subsection 15(2)(c) of the *Evidence Act 1977* (Qld) dealing with good character, which is one of the exceptions where a defendant can "lose the shield", along with subsection 15(2)(d), from being cross-examined on their bad character and can arise because 'just as the accused as a witness is required to answer questions in cross-examination which are relevant to the case in hand, so too the defence is entitled to cross-examine Crown witnesses and challenge their version of events.[53]

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[45] Gans and Palmer (n 34) [12.3.1].
[46] Ibid [12.3.2].
[47] *(a pseudonym) v The Queen* [2013] VSCA 388.
[48] Gans and Palmer (n 34) [12.3.2].
[49] Section 59, exclusion of hearsay evidence (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation. Specific exception to the hearsay rule: character of and expert opinion about accused persons (ss 110 and 111).
[50] Section 76, the opinion rule, (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. Specific exceptions: character of and expert opinion about accused persons (ss 110 and 111).
[51] 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 to act in a particular way, or to have a particular state of mind.
[52] Section 102, Credibility evidence about a witness is not admissible, subject to specific exceptions; evidence adduced in cross-examination (ss 103 and 104); evidence in rebuttal of denials (s 106); evidence to re-establish credibility (s 108); evidence of persons with specialised knowledge (s 108C) and character of accused persons (s 110).
[53] Hemming and Layton (n 4) [6.125].

As addressed, in the South Australian case of *P v The Queen*[54], insight into the way the shield is *not* forfeited[55] was examined by the Court of Appeal. In *P v The Queen*, the defendant was convicted of three counts of incest and elected to give evidence. At the end of the examination-in-chief, the prosecutor sought leave to cross-examine his prior convictions. The basis was twofold: (1) his own good character was put forward; and (2) he had made imputations on the character of his daughter, to whom had alleged her father had committed incest. In this case, judicial discretion was given when deciding if the shield had come down regarding the defendant's good character through his fundraising activities and was also given the benefit of not 'overstepping the line' with regards to the imputations against his daughter, as a proper defence was given in both instances. The first basis on which the prosecution sought leave was discussed by King CJ who found that "this was very much a borderline case [as] the appellant got very close to impliedly asserting his good character but I have reached the conclusion that he did not overstep the line".[56] On the second basis, regarding the character imputations made against his daughter, the purpose of this cross-examination was to show her past history of stealing had led to threats of being sent to a girls' home, in which there was a motive for the allegations against her father. However, the defendant's shield was lost after the defendant raised evidence of the sexual activities of his daughter which created an imputation on her character. With the defendant's shield lowered, the prior conviction, for the attempted rape of his other daughter, was adduced. This was so prejudicial to the defence that it "made a fair trial virtually impossible".[57] King CJ stated that "It would be obvious [that] disclosure would be so prejudicial to the fair trial that any… bearing…upon the credibility of the appellant as a witness would fade into insignificance".[58]

There are certain differences between the conditions imposed by section 104(4)(a) with respect to the cross-examination of a defendant about matters relating to the defendant's credibility and those imposed under section 110 on the admissibility of evidence to rebut good character evidence adduced by a defendant.[59] Leave is required before a defendant can be cross-examined under section 104(4)(a) or section 110. However, under section 110 the prosecution may, with leave, cross-examine the defendant only if the defendant has adduced evidence with

[54] [1993] 61 SARS 75.
[55] Hemming and Layton (n 4) [6.125].
[56] *P v The Queen* [1993] 61 SARS 75, 58 (King CJ).
[57] Ibid at 79-80 (King CJ).
[58] Ibid.
[59] Australian Law Reform Commission, *Review of the Uniform Evidence Act*s (Discussion Paper No 69, 2005) 324 [11.37].

the positive intention of proving that he or she is a person of good character.[60] In addition, cross-examination of a defendant under section 110 must respond as a 'mirror image' to the good character evidence adduced by the defendant.[61] Section 104(4)(a) does not appear to be confined in these ways. In particular, it applies where the defendant has adduced evidence 'that tends to prove' that the defendant is of good character and is not confined to the parameters of the character evidence adduced on behalf of the defendant.[62] Thus, as to those aspects, a wider power is given to the prosecution in cross-examination relevant only to credit under section 104(4)(a).[63]

At the same time, cross-examination under s 104 must satisfy the requirements of section 103, with the result that leave can only be given under section 104 where the cross-examination relates to evidence of 'substantial probative value'.[64] This requirement is not laid down in section 112 where the accused has deliberately adduced evidence of good character.[65]

F *Conclusion*

Though the language of the common law is more in keeping with that of the *Criminal Evidence Act 1898* (England and Wales), the effect of sections 104 and 110 of the *Uniform Evidence Act 1995* (Cth) is still broadly similar. In comparing the bad character provisions between the common law and the UEL, the main differences are that firstly, the UEL has split credibility and character and secondly, the use of the wording 'particular respect', defined as being the accused's intention[66], giving more leeway to the defendant under the UEL. Judicial discretion is still the cornerstone of the common law and the UEL though there are borderline cases, such as in the case of *P v The Queen*[67], where it is not clearly apparent as to whether or not the shield has been lowered.

This chapter has shown that Australia's bad character evidence rules have only experienced minor differences between the common law and the UEL regimes and that the similarities in the language between section 15 of the *Evidence Act 1977* (Qld) and the UEL sections of 104(4)(a) and 110(2) and (3) are clear.

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[60] Australian Law Reform Commission, *Review of the Uniform Evidence Act*s (Discussion Paper No 69, 2005) 324 [11.38].
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid at [11.39].
[65] Ibid.
[66] Greg Taylor, 'Respects of Character' (2020) 44(1) *Criminal Law Journal* 32, 41.
[67] *P v The Queen* [1993] 61 SARS 75.

Chapter III will address the propensity evidence rules in Australia and the tests used. At the end of that chapter, an overall picture of the current Australian evidence rules will be apparent. This will then provide a comprehensive basis to compare with the *Criminal Justice Act 2003* (England and Wales) in Chapter IV.

CHAPTER III – PROPENSITY EVIDENCE IN AUSTRALIA

"Whatever is the natural propensity of a person is hard to overcome. If a dog were made a King, he would still gnaw at his shoelaces" – Bill Vaughan

A *Overview*

This chapter will discuss the operation of propensity evidence in Australia and the requirements needed for the admission of such evidence under both the common law and UEL, which were briefly set out in table 2 in Chapter II.

In the overview of Chapter II, the difference in the admissibility rules of propensity evidence, as opposed to bad character evidence was outlined. The essence of this difference is the ability of the Crown to take the initiative and seek the leave of the Court to adduce evidence of the defendant's previous history in relation to similar offences to the offence with which he or she is now charged, as opposed to bad character evidence in general where the Crown has to wait and see if the defence lowers the 'shield'.

As will be discussed in this Chapter, the history of the admission of propensity evidence in Australia mirrors the common law development in England until 1995, which date marks the emergence of the UEL. After further statutory changes, there are now five different tests for the admission of propensity evidence in Australia as compared with the single common law test in 1995.

B *Common Law History And Development*

The circumstances surrounding Australia's current propensity rules originated from the case of *Makin v Attorney-General* (NSW) (*Makin*)[68] where Lord Herschel LC established two conflicting principles:

> It is undoubtedly not competent for the prosecution to adduce evidence tending the 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

[68] [1894] AC 57.

> 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.[69]

The first sentence refers to a principle of *exclusion* that evidence of previous criminal activity and bad character is not admissible to establish guilt as per the offences on the indictment based on the risk of prejudice to the accused.[70] In contrast, the second sentence sets out a rival principle of *inclusion*, where evidence relevant to a fact is at issue, and should be admitted if it does not fall within a recognised rule of exclusion.[71] It will become apparent that the courts in both England and Australia struggled to reconcile these two conflicting principles in *Makin* and therefore oscillated between variations of different tests.

The *Makin* principles were applied through a succession of cases where propensity evidence was represented as 'relationship evidence',[72] 'statistically improbable',[73] 'identification evidence',[74] 'coincidence evidence',[75] or was excluded as highly prejudicial and unfair to the accused.[76]

A watershed case in the development of the common law treatment of propensity evidence was the 1975 case of *DPP v Boardman* (*Boardman*).[77] The House of Lords dismissed *Boardman's* appeal and held that to be admissible, propensity evidence must bear a *striking similarity* to the facts of the case currently before the court[78] and the approach should be 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.[79]

[69] *Makin v Attorney General for New South Wales* [1894] AC 57, 65 (Lord Herschell LC).
[70] Andrew Hemming, *Is There Any Prospect of a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia?* (2020) 44 Crim LJ 207, 208.
[71] Ibid.
[72] *R v Ball* [1911] AC 47.
[73] *R v Smith* (1915) 11 Cr App R 229.
[74] *Sutton v The Queen* (1984) 152 CLR 528.
[75] *BBH v The Queen* (2012) 245 CLR 499.
[76] *Perry v The Queen* (1982) 150 CLR 580.
[77] *DPP v Boardman* [1975] AC 421.
[78] Hemming (n 70) 209.
[79] *Boardman* (n 77) 442 (Lord Wilberforce).

Boardman seems to have set the high-water mark of exclusion of propensity evidence and was followed by the High Court of Australia in a succession of cases commencing in 1978.[80]

Nine years later, *Boardman's* ruling influenced the High Court judgement in *Sutton v The Queen* (*Sutton*),[81] where Dawson J identified the test of admissibility for propensity evidence as being one of no rational view consistent with the innocence of the accused[82] meaning the evidence can only be adduced if it proves that the accused committed the offence. The decision in *Sutton* demonstrated that at common law, the bar for the admission of propensity evidence was very high.[83]

The High Court in *Pfennig v The Queen* (*Pfennig*),[84] 11 years after *Sutton*, ruled that the basis for the admission of propensity evidence lay in it 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.[85]

The reason why the High Court set the bar so high for the admission of propensity evidence was the danger that the jury may wrongly give [propensity] evidence far more weight than it deserves.[86] The *Pfennig* test was subsequently reaffirmed in a number of cases including *Phillips v The Queen* (*Phillips*),[87] *HML v The Queen* (*HML*),[88] *Roach v The Queen* (*Roach*),[89] and *BBH v The Queen* (*BBH*).[90] In *HML*, the defendant was charged with sexual offences and appealed on the applicability of the *Pfennig* test. The appeal was rejected, and Hayne J stated that it was because, 'the evidence [revealed] illegal or discreditable conduct on occasions *other* than those giving rise to the charges'[91] and that 'the question of its admissibility [can only] be resolved by applying the test stated in *Pfennig*'.[92] In contrast *Roach*, who was convicted of assault occasioning bodily harm, appealed that the *Pfennig* test *should* have been applied in

[80] *Markby* (1978) 140 CLR 108; *Perry* (1982) 150 CLR 580; *Hoch* (1988) 165 CLR 292; *Harriman* (1989) 167 CLR 590 as cited in Ian Barker QC, Tendency and Coincidence Evidence in Criminal Cases (2011) *Bar News Criminal Law Special Edition*, 1-36 [17].
[81] *Sutton v The Queen* (1984) 152 CLR 528.
[82] Ibid 564-565.
[83] Hemming (n 70) 210.
[84] *Pfennig v The Queen* (1995) 182 CLR 461.
[85] Previously, in *Hoch v The Queen* (1988) 165 CLR 292, 296, 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 as cited in Hemming (n 66) 210.
[86] *Pfennig* (n 84) [45] (McHugh J).
[87] *Phillips v The Queen* (2006) 225 CLR 303.
[88] *HML v The Queen* (2008) 235 CLR 334.
[89] *Roach v The Queen* (2011) 242 CLR 610.
[90] *BBH v The Queen* (2012) 245 CLR 499.
[91] *HML* (n 88) [169] (Hayne J).
[92] Ibid.

this case to determine admissibility under section 132B or exercising the discretion under section 130. The appeal was dismissed by the Court of Appeal on the grounds that the rule in *Pfennig* applied and that 'the rule in *Pfennig* cannot be imported'[93] because if applied, 'it would not be possible for a trial judge to test for unfairness in a consistent manner'.[94]

In 1995 the UEL commenced in the Commonwealth and the state of New South Wales and modified the common law by dividing the rule for admitting propensity evidence into the tendency rule under section 97 and the coincidence rule under section 98 based on reports written by the Australian Law Reform Commission (ALRC) dating back to 1979. The ALRC was put in charge of reviewing:

> ….the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements and to report (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts and (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary.[95]

The language created by the UEL took the 'no rational explanation' test of *Pfennig* and lowered it by placing emphasis on the balancing process between probative value and prejudicial effect.[96] This will be explained further in section E.

Although the common law states of Queensland, South Australia and Western Australia chose not to enact the UEL, the high bar for admission of propensity evidence in *Pfennig* was also not satisfactory to South Australia and Western Australia. Subsequently, they both amended their respective Evidence Acts. South Australia implemented section 34P under the *Evidence (Discreditable Conduct) Amendment Act 2011* (SA), and Western Australia implemented section 31A under the *Evidence Act 1906* (WA).

More recently, the most significant modification made to the propensity rules in Australia, under the UEL, was the enactment of section 97A by the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) and *Evidence (National Uniform Legislation) Amendment Act 2021* (NT), which came from recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse which is discussed further in section H.

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[93] *Roach* (n 89) [37] (French CJ, Hayne, Crennan and Kiefel JJ).
[94] Ibid.
[95] Law Reform Commission, *Evidence Law Reform – Stage 2* (Discussion Paper 23, 1985) 2 [1].
[96] Hemming (n 70) 211.

The changes that have been made to the common law since *Makin* has now resulted in Australia harbouring five different tests for the admission of propensity evidence, compared to England which only has one. Australia's five tests will now be examined in the order of Queensland, UEL, South Australia, Western Australia, and section 97A which is only found in New South Wales, Northern Territory and Australian Capital Territory Acts, which reflects the difficulty of admission of propensity evidence and is essentially a policy decision. Jurisdictions in Australia have adopted different tests depending on where the balance between admission (probative value) and exclusion (prejudice) is set.

Australian Policy Balance between probative and prejudicial evidence

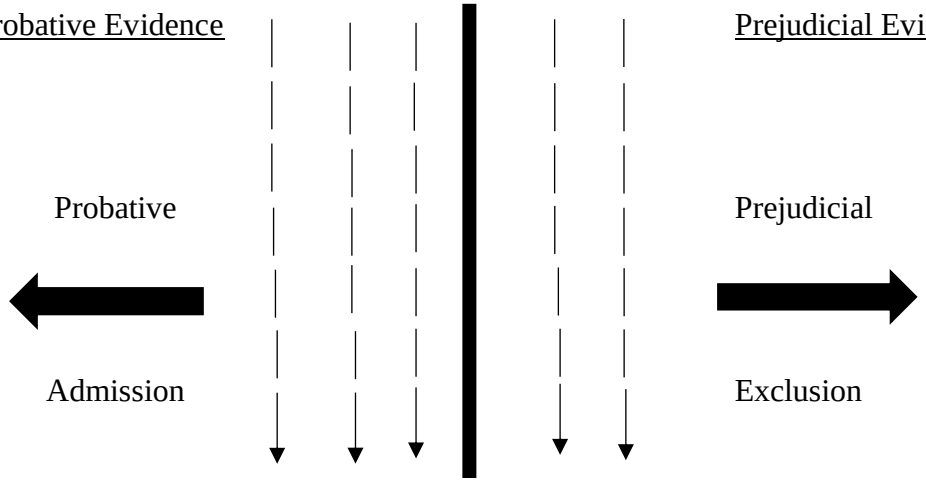

Table 3

This table depicts the tension originally identified in *Makin* between the inclusion principle applying to highly probative evidence and the exclusion principle applying to highly prejudicial evidence.

Where the balance is set between the two conflicting principles is a policy decision. Thus, the dotted lines in table 3 represent the position where a particular jurisdiction fixes the policy balance, which is determined by the nature of the test the prosecution must satisfy in order for the propensity evidence to be admitted. For example, as depicted on the left-hand side dotted line, the test for admission of propensity evidence in New South Wales, Northern Territory, and the Australian Capital Territory for child sexual offences under section 97A is weighted towards the principle of admission rather than the principle of exclusion by virtue the rebuttable presumption that the tendency evidence has significant probative value. In England, as will be discussed in depth within the next Chapter, the policy decision incorporated into

section 101 of the *Criminal Justice Act 2003* (England and Wales) favours the admission of tendency evidence generally, which was a radical move away from the longstanding rule of exclusion found in *Makin* and *Boardman.*

C *The Five Tests Of Propensity Evidence In Australia*

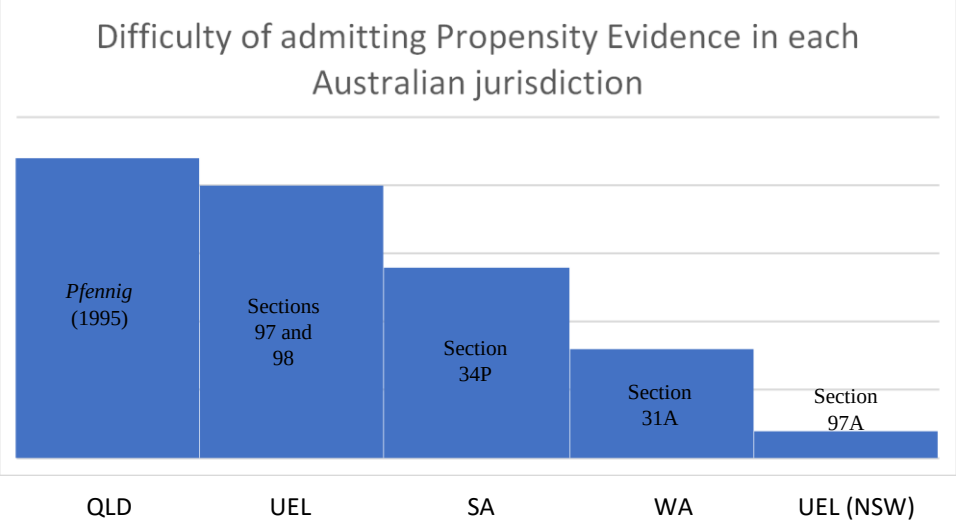

Table 4 – Admitting Propensity Evidence in Australia

As seen in table 4 above, Australia has five tests for the admission of propensity evidence. Queensland is the only state which continues to follow the *Pfennig* test which has the highest bar for the admission of propensity evidence. This has proved to be unacceptable to policy-makers in other jurisdictions. Following Queensland are the tendency and coincidence rules under sections 97, 98 and 101 of the UEL. South Australia is next on the descending scale of difficulty of admission with the probative v prejudicial test under section 34P of the *Evidence Act 1929* (SA), followed by Western Australia and the public interest test under section 31A of the *Evidence Act 1906* (WA). The most recent amendment and lowest bar is the introduction of section 97A into the *Evidence Act 1995* (NSW), the *Evidence Act 2012* (NT) and the *Evidence Act 2011* (ACT). Section 97A significantly lowers the bar for the admission of propensity evidence, but only for proceedings involving child sexual offences[97] by creating a rebuttable presumption. Currently, only New South Wales, the Northern Territory

[97] Hemming (n 70) 212.

and Australian Capital Territory have adopted this test, however, all jurisdictions within the UEL regime are expected to adopt this test also.[98]

D *Queensland – The Pfennig Test*

Queensland's high bar comes from the case of *Pfennig v The Queen*[99] where the rule for admitting propensity evidence is: '[Propensity] evidence… will be admissible only if its probative value exceeds its prejudicial effect… in other words, that there is no reasonable view of the evidence consistent with the innocence of the accused'.[100] This case involved the sexual assault and murder of a boy, whose body was never found. Highly probative evidence was admitted involving a previous conviction for a similar offence of sexual assault and false imprisonment in which the boy escaped. In deciding to admit the propensity evidence, the trial judge relied on *Hoch v The Queen* (*Hoch*). [101]

Dawson J suggested in *Harriman v The Queen*[102] that this high standard of proof is required due to the fact that propensity evidence is circumstantial as opposed to direct, meaning the only proof it provides is obtained by inference.[103] While Queensland retains the *Pfennig* test for the admission of propensity evidence, there have been two amendments to the common law: section 132A and section 132B.

Section 132A provides that '[propensity] evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the grounds that it may be the result of collusion or suggestion'.[104] This section was introduced with the intention of statutorily overruling the decision in *Hoch*. [105] In *Hoch*, the High Court held that evidence, which was the possible result of a concoction between complainants, should be deemed inadmissible and not be put before a jury.[106]

Section 132B was introduced into Parliament by the then Shadow Attorney-General, Matt Foley.[107] Foley spoke of how he hoped the provision would address the injustice and

[98] "I anticipate that comparative bills will be introduced in Victoria, Tasmania, the Australian Capital Territory, Northern Territory and the Commonwealth': New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020, 15:37:17 (Mark Speakman).
[99] *Pfennig* (n 84).
[100] Ibid 483-4 (Mason CJ, Deane and Dawson JJ).
[101] *Hoch v The Queen* (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ).
[102] *Harriman v The Queen* (1989) 167 CLR 590.
[103] Ibid 602 (Dawson J).
[104] *Evidence Act 1977* (Qld) s 132A.
[105] *Hoch v The Queen* (1988) 165 CLR 292
[106] Ibid 296 (Mason CJ, Wilson and Gaudron JJ).
[107] Queensland, *Parliamentary Debates*, Legislative Assembly, 25 March 1997, 824 (Matt Foley, Shadow Attorney-General).

discrimination experienced by women under the previous criminal justice system by defining clearly and unambiguously the process for admitting evidence of prior domestic violence.[108]

Section 132B expressly states, that to be admissible, evidence of the history of the domestic relationship between the defendant and the complainant must be 'relevant'[109] and was introduced with the intention of clarifying and simplifying the process of admitting relationship evidence; however, whether it has achieved this aim is something over which commentators have expressed doubt.[110] Thus, Queensland retains the common law test for propensity evidence apart from domestic violence trials.

E *UEL – The Tendency And Coincidence Rules: s 97, 98 And 101.*

In 1979 the Australian Law Reform Commission commenced a review of the laws of evidence, which culminated in the publication of a report and draft code.[111] Ultimately, it was this review that led to the Commonwealth and New South Wales adopting similar legislative frameworks governing evidence in 1995[112](see Appendix A).

One of the aims of the evidential reforms in 1995 by the UEL was to expand the scope of evidence available to be admitted in a proceeding, thus reducing the number of exclusionary rules.[113] While relaxing the limitations on the admissibility of evidence allows the court to consider a greater variety of evidence relating to a matter, it also raises competing policy concerns that evidence may be admitted that is unfairly prejudicial to the accused.[114]

The introduction of the UEL to Australia saw the common law propensity test split into two rules: tendency evidence and coincidence evidence, and while there are some distinctions between the two, the commonalities are greater.[115] The tendency rule under section 97(1) refers to a tendency 'to act in a particular way, or to have a particular state of mind'. The coincidence rule under section 98(1), relates 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

[108] Ibid.
[109] *Evidence Act 1977* (Qld) s 132B(2).
[110] Taskforce on Women and the Criminal Code, 'Report on the Taskforce on Women and the Criminal Code' (Department of Justice and Attorney-General (Qld), 2000) 110, 140-5.
[111] Andrew Hemming, Miiko Kumar and Elisabeth Peden, *Evidence: Commentary and Materials* (Thomson Reuters, 8th ed, 2013) 2.
[112] *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).
[113] Hemming, Kumar and Peden (n 111) 367.
[114] Rebecca Campbell, Domestic Relationship Evidence in Queensland: An Analysis of a Misunderstood Provision (2019) *UNSW Law Journal*, Vol 42(2), 430-461 [433].
[115] 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) 175,1.

circumstances in which they occurred'. As previously mentioned, the policy reasons behind the UEL reforms were to expand the scope of evidence available to be admitted in a proceeding to reduce the number of exclusionary rules.[116]

Section 101 (see Appendix A) provides the balancing test for sections 97 and 98. Section 101(2), for all UEL-adopted states and territories except for New South Wales, the Northern Territory and the Australian Capital Territory, provides that tendency or coincidence evidence adduced by the prosecution (in accordance with sections 97 and 98) cannot be used against the defendant unless the 'probative value of the evidence outweighs the danger of unfair prejudice to the defendant'.[117] Recent amendments to section 101(2) in New South Wales, the Northern Territory and Australian Capital Territory were made to change the test from 'substantially outweighs' to simply 'outweighs' 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'. [118] This amendment applies to sections 97, 97A and 98.

There is a significant volume of commentary on whether the test under section 101 is in fact different or more stringent than the common law *Pfennig* test and also on whether the *Pfennig* threshold must still be satisfied in cases where section 101 applies.[119]

Until *Regina v Ellis* (*Ellis*),[120] the intention of the parliamentary draftsmen of the UEL and the ALRC was to replicate the common law test applied to the admission of tendency and coincidence evidence under the Evidence Act[121] with the application of the *Pfennig* test. In *Ellis*, the New South Wales Court of Criminal Appeal rejected the view that the *Pfennig* test applied to propensity and coincidence evidence.[122] In the leading judgement, Spigelman CJ opined that whilst the formulation of the statutory test under section 101(2) requiring that the probative value of the evidence 'substantially' outweigh its prejudicial effect was in similar territory to *Pfennig*'s 'no rational explanation' test, it was nonetheless still a different standard.[123] Spigelman CJ went on to clarify that the test under section 101(2) expressly called

[116] Hemming, Kumar and Peden (n 111) 3.
[117] Section 101(2) *Evidence Act 1995* (NSW).
[118] Mark Speakman (Cronulla – Attorney General, and Minister for the Prevention of Domestic Violence), 'Evidence Amendment (Tendency and Coincidence) Bill 2020' (Second reading speech, Legislative Assembly Hansard, NSW Parliament, 25 February 2020).
[119] Campbell (n 114) [452].
[120] *Regina v Ellis* (2003) 58 NSWLR 700.
[121] John Stratton, SC Deputy Senior Public Defender, 'Tendency and Coincidence Evidence' Public Defenders Criminal Law Conference 2008 (Revised September 2008) 1.
[122] Ibid.
[123] *Ellis* (n 120) 717-18 (Spigelman CJ).

for a court to make a judgement after first conducting a balancing exercise unique to the facts of each case.[124] Spigelman CJ differentiated this from *Pfennig* by concluding that the *Pfennig* 'no rational explanation' test obviated any real balance by requiring such a high standard of probative value.[125] Despite this, Spigelman CJ did not rule out the possibility of section 101(2) applying to the extent of *Pfennig*'s 'no rational explanation' requirement in cases where the facts called for a higher threshold.[126] Although *Ellis* now has to be read in light of the amendment in section 101(2) in New South Wales and the Northern Territory, *Ellis* is valid in all other states and territories under UEL jurisdiction. Section 101(2) will be discussed further in section H.

In cases decided since *Ellis*, it has become clear that a consideration of the probative value of the proposed tendency or coincidence evidence requires a consideration of the degree of similarity between the two or more acts.[127]

When discussing exactly how far the bar has been lowered under the tendency and coincidence rules in comparison to *Pfennig*, Stratton's[128] 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.[129]

The author respectfully agrees with Stratton's conclusion because when you look at the language used, the degree of difference between section 101(2) in comparison to *Pfennig* is marginal. Notwithstanding the emphasis on the balancing test in *Ellis*, why this bar has not been lowered further could be due to the policy-makers wanting to appear as addressing the situation, without moving too far away from the safety of common law traditions.

F *South Australia – The Probative vs. Prejudicial Test*

An amendment made to section 34P of the *Evidence Act 1929* (SA) (see Appendix A) for adducing propensity evidence was introduced through the *Evidence (Discreditable Conduct) Amendment Act 2011* (SA). Essentially, this amendment introduced Pt 3 Div. 3 Admissibility of evidence showing discreditable conduct or disposition which slightly lowered the common law threshold for the admission of discreditable conduct or disposition evidence

[124] Ibid 718 [95] (Spigelman CJ).
[125] Ibid (Spigelman CJ).
[126] *Ellis* (n 111) 718 [96] [(Spigelman CJ).
[127] Stratton (n 121) 4.
[128] Stratton (n 121).
[129] Hemming (n 70) 216.

(bad character evidence).[130] However, while the bar of impermissible use by section 34P(1) appears stricter than *Pfennig* or the UEL, it is qualified by section 34P(2).[131]

This section preserves the first principle stated in *Makin*, preventing the introduction of evidence to show that the defendant is more likely to have committed the offence because he or she has engaged in other discreditable conduct.[132] In other words, it precludes evidence used simply to show the 'mere' or 'general' criminal propensity of the accused.[133]

Section 34P(2)(a) reflects and modifies the second principle from *Makin* and provides that such evidence may be admitted if adduced for a permissible purpose beyond showing a 'mere' or 'general' propensity to commit bad acts.[134]

Section 34P(2)(b) deals with propensity evidence and operates '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'.[135] The discreditable conduct evidence may be admitted for a 'permissible use' if both its probative value substantially outweighs its prejudicial effect under section 34P(2)(a), and, 'the evidence has strong probative value having regard to the particular issue or issues arising at trial'.[136]

The policy decision surrounding the move away from the common law was addressed by the South Australian Attorney-General, John Rau, who commented that the common law [was]: '… 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.'[137]

The *Pfennig* test, as Hamer observes, sets such a high test of admissibility, that in very few cases in practice would this test be capable of satisfaction.[138] This high bar of admissibility of propensity evidence reflects its historic purpose because the evidence is so prejudicial to the defendant. In contrast, while not going so far as to routinely admit propensity evidence, by abolishing the *Pfennig test*, the new section 34P, will allow it to be adduced as circumstantial evidence of a fact at issue where it has 'strong probative value' due to the nature of the case.[139]

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[130] Ibid 218.
[131] Ibid.
[132] D. Platter, L. Line and R. Davis, '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) *Flinders Law Journal*, 72, 17.
[133] Ibid.
[134] Platter, Line and Davis (n 132) 18.
[135] Ibid 76.
[136] Ibid.
[137] South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3287 (John Rau).
[138] David Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609, 613.
[139] Platter, Line and Davis (n 132) 79.

Additionally, regarding the decision not to take up the test for tendency and coincidence evidence in the UEL, Rau described it as 'not without its benefits but that the model is also not without its problems and has not [been] met with universal acclaim'.[140] In his second reading speech, Rau explained that:

> for evidence to have 'a strong probative value' it must have regard to the particular issue/s in the case and be more than simply material or relevant", and also noted that it will depend on particular facts of each case and though a relatively high test 'strong probative value' under the Act was not "intended to be as demanding as *Pfennig* but sets a lower standard for the admission of such evidence, however, is not intended to open the door to routine admissions of evidence of discreditable conduct.[141]

In other words, section 34P of the *Evidence Act 1929* (SA) retains the common law's approach that evidence of discreditable conduct should always be carefully scrutinised before it is admitted.[142]

The addition of section 34P was designed to simplify and clarify the common law.[143] Though section 34O(1) provides that this test 'prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency,' it is clear that this new test continues to be influenced by the common law with respect to its treatment of propensity evidence.[144] However, this comment has been seen in the political context of a government seeking to lower the bar of admission of propensity evidence for policy reasons as depicted in table 3. What is missing is a more radical policy change dealing with bad character evidence in general, which was the thrust of the revolutionary change made in England in 2003.

G *Western Australia – The Public Interest Test*

Section 31A of the *Evidence Act 1906* (WA) (see Appendix A) provides that propensity evidence is admissible in a proceeding if the court considers the evidence firstly has significant probative value either by itself or in combination with other evidence, and secondly, '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.[145] This test is considered to be less

[140] Rau (n 137).
[141] Rau (n 137) 3290.
[142] Platter, Line and Davis (n 132) 83.
[143] Ibid 16.
[144] Rau (n 137) 3291.
[145] *Evidence Act 1906* (WA) s 31A(2).

stringent than the *Pfennig* 'no rational explanation' test and instead is considered a replica of McHugh J's balancing test outlined in his dissenting judgement in *Pfennig*.[146]

Section 31A was policy-driven and introduced to make it easier for the prosecution to adduce propensity or relationship evidence in sexual offences.[147] Where a victim had to give evidence about alleged different sexual offences on different dates, the intention was that section 31A would allow these different alleged sexual offences to be joined at the one trial.[148] Section 31A was part of a wider package of reform related to the joinder of trials[149] where the intention of Parliament was for juries to learn about all the charges together rather than each charge in isolation.[150]

Roberts-Smith JA observed that the definition of 'propensity evidence' in section 31A was wider than the definition at common law[151] and capable of a broader application. However, there are safeguards against the overreach of section 31A which are found in the four tests Australian Courts have formulated over time.[152]

The first test is whether the proposed evidence constitutes 'propensity evidence' or 'relationship evidence', or both.[153] The second test is whether the evidence is relevant to the facts at issue or, 'must be such as could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding'.[154] The third test is that the evidence by itself or with other evidence has 'significant probative value'.[155] The fourth test is a balancing exercise by the Court which must consider whether a fair-minded person would think the probative value compared to the degree of risk of an unfair trial means that the public interest prioritises adducing this evidence.[156] This 'risk' is that a jury would reason that because the defendant previously behaved in a similar manner to the current charge, they are likely to have committed the current charge.[157]

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[146] Western Australia, *Parliamentary Debates*, Legislative Council, 24 September 2004, 6547 (Nick Griffiths).
[147] William Yoo, Re-Thinking Evidence Act 1906 (WA), Section 31A Evolution, Experience and Back to Basics (2015) *The University of Western Australia Law Review*, Vol 40, 481, 481.
[148] Ibid.
[149] *Evidence Act 1906* (WA), s 31A was introduced as part of a legislative package which included the *Criminal Procedure 2004* (WA), 133 which allows for the separation of trials of an indictment containing multiple charged.
[150] Yoo (n 147) 482.
[151] *Di Lena v The State of WA* (2006) 165 A Crim R 482, 493 (Roberts-Smith JA).
[152] Yoo (n 147) 483.
[153] *Evidence Act 1906* (WA), s 31A(1)(a) and or s 31A(1)(b).
[154] *Goldsmith v Sandilands* (2002) 76 ALJR 1024, [2] (Gleeson CJ).
[155] *Evidence Act 1906* (WA), s 31A(2)(a).
[156] *Evidence Act 1906* (WA), s 31A(2)(b).
[157] *Donaldson v State of WA* (2005) 31 WAR 122, [130] (Roberts-Smith JA, with whom Wheeler JA and Miller AJA agreed).

Roberts-Smith JA considered that unlike the *Pfennig* test or the tests under the UEL, section 31A does not involve the exercise of discretion, but instead is a question of law:

> There is no discretion, because if the trial Judge concludes the propensity evidence has significant probative value, and that fair minded people, comparing that probative value to the risk of an unfair trial, would think the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial, he or she is bound to admit it.[158]

Section 31A is considered the most successful and progressive of the reforms centred on the admission of tendency and relationship evidence[159] by those advocating a lower bar of admission. Section 31A's reference to the 'public interest' is unique and reflects the public policy justification in favour of the admission of relationship evidence.[160] However, though it appears in writing that section 31A relaxes the stringency of the *Pfennig* test, in practice, section 31A is still a high bar for the prosecution to reach when admitting evidence of propensity.

However, in May of 2022, the Law Reform Commission of Western Australia released their final report on the Admissibility of propensity and relationship evidence in Western Australia[161] in which they stated that '…it is a matter of public knowledge that new evidence legislation is currently being drafted to replace the Evidence Act. The new Act will adopt the UEL but will retain any Western Australian evidentiary provisions that are deemed sound'.[162] This would mean that the bar for the admission of propensity evidence would be raised to the UEL standard and would also mean the adoption of sections 97A and 101(2) for child sexual offences which are discussed in the below section.

[158] *Di Lena v The State of WA* (2006) 165 A Crim R 482, 495 [60].
[159] Annie Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia' (Report, National Child Sexual Assault Reform Committee, 2010) 186-203.
[160] *Roach* (n 89) at [43] (French CJ, Hayne, Crennan and Kiefel JJ).
[161] Western Australia Law Reform Commission, *Admissibility of propensity and relationship evidence in WA* (Final Report Project 112 (2022) ('WALRC').
[162] Ibid at 5 [1.2.4].

H *Amendments To The Legislation: Section 94, Section 97A And Section 101(2) – Evidence Act 1995 (NSW), Evidence Act 2012 (NT) And Evidence Act 2011 (ACT).*

It has been stated that the Australian criminal justice system is frequently criticised for its lack of effectiveness in dealing with crimes involving child sexual abuse. [163] Inferential reasoning concerning tendency and coincidence evidence is considered dangerous in criminal trials 'because [it] permit[s] a person to be judged by his or her conduct on other occasions rather than by evidence directly or indirectly focused on the subject event, thus giving rise to 'inevitable prejudice'.[164]

The *Evidence Amendment (Tendency and Coincidence) Bill 2020* was introduced by the New South Wales Government in response to the Royal Commission into Institutional responses to Child Sexual Abuse report who believed that 'admissibility should be broadened through the adoption of a straightforward balancing admissibility test'.[165] The Bill amended sections 94 and 101 as well as introduced a new section 97A into the *Evidence Act 1995* (NSW). Section 97A has also been adopted into the *Evidence Act 2012* (NT) and the *Evidence Act 2011* (ACT).

The High Court has stated that common law concepts on propensity evidence 'do not stand with the scheme of Pt 3.6[166] of the UEL'.[167] In response to this, two reforms under section 94 were proposed to 'put beyond doubt that any principle or rule of common law or equity preventing or restricting the admissibility of this kind of evidence is not relevant when applying part 3.6 of the *Evidence Act 1995* (NSW)'.[168] This resulted firstly in section 94 implementing the Royal Commission's recommendation[169] which stated:

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[163] Cindy Cameronne and Wyn Diong, Evidence Reform: Discussing the Royal Commission's Recommendations (2020) Legal Insight, Thomson Reuters (online).
[164] Royal Commission into Institutional responses to Child Sexual Abuse, referring to *Sutton v The Queen* (1984) 152 CLR 528; 11 A Crim R 331; [1984] HCA 5 cited in Cameronne and Diong (n 163).
[165] David Hamer, 'Propensity Evidence Reform after the Royal Commission into Child Sexual Abuse' (2018) 42(4) *Criminal Law Journal* 234, 38.
[166] *Evidence Act 1995* (NSW) s 3.6 Tendency and Coincidence.
[167] Speakman (n 118).
[168] Ibid at 6.
[169] Royal Commission recommendation 46: Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

> 94(4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant.

The second reform to section 94 found itself aligning with High Court decisions on assessing the probative value of tendency and coincidence evidence to close the small gap left by the courts[170] and ensures that the Royal Commission's recommendation[171] on collusion, concoction and contamination was fully implemented. This section now states that:

> 94(5) In determining the probative value of tendency evidence or coincidence evidence for the purposes of section 97(1)(b), 97(4), 98(1)(b) or 101(2), it is not open to the courts to have regard to the possibility that the evidence may be the result of collusion, concoctions, or contamination.

Section 97A (see Appendix A) was introduced to alter the test that tendency and coincidence evidence is only admissible where a court considers that it will have significant probative value and 'address the application of the test in child sexual abuse protections to facilitate greater admissibility of tendency evidence in those proceeding's'.[172] This section only applies in criminal proceedings where the issue of the offence committed constitutes, or may constitute, a child sexual offence and provides that:

In those proceedings, tendency evidence about the defendant's sexual interest in a child or children or about the defendant acting on a sexual interest in a child or children is presumed to have significant probative value.

The explanatory notes of the Royal Commissions report state that the objective of section 97A was:

> to introduce a rebuttable presumption that certain tendency evidence relating to a child sexual offence is presumed to have significant probative value and to set out matters that may not ordinarily be taken into account by a court to overcome that presumption and determine that the evidence does not have significant probative value. [173]

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[170] Speakman (n 118) 7 (High Court).
[171] Royal Commission recommendation 47: Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other factfinder.
[172] Speakman (n 118) 4.
[173] Overview, "Evidence Amendment (Tendency and Coincidence) Bill 2020", part (c), *Evidence Act 1995* (NSW).

It should be noted that while the addition of section 97A has been made, section 97 of the UEL has been left unchanged. Section 97A introduces a rebuttable presumption that tendency evidence identified in section 97A(2), has significant probative value for the purposes of sections 97(1)(b) and 101(2).[174] This rebuttable presumption, by virtue of section 97A(4), 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, section 97A(4) is qualified by section 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".[175] It can be anticipated that given the rebuttable presumption under section 97A(4), the breadth of those matters listed in section 97A(5) ensures that courts will face a difficult task interpreting the meaning of "exceptional circumstances".[176]

In addition to the insertion of section 97A, section 101(2) has been modified and now reads as 'the probative value of the evidence outweighs the danger of unfair prejudice to the defendant'.[177] The reasoning behind this was explained by the New South Wales Attorney-General:

> 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.[178]

The removal of the word 'substantially' is a further erosion of the common law protection, the presumption of innocence and represents a lowering of the bar for the admission of tendency and coincidence evidence.[179]

It was concluded in the Bill's second reading speech by Mark Speakman that these reforms will 'implement a fairer approach to the admissibility of tendency and coincidence

[174] Hemming (n 70) 226.
[175] *Uniform Evidence Legislation 1995* (NSW) section 97A(5)(a)-(g).
[176] Hemming (n 66) 226.
[177] Hemming (n 66) 226.
[178] New South Wales, *Parliamentary Debates*, House of Assembly, 25 February 2020, 15:37:17 (Mark Speakman).
[179] Hemming (n 70) 226.

evidence' based on the recommendations by the Royal Commission on evidence in child sexual offence prosecutions.[180] Mr Speakman follows by stating that:

> the Bill does not displace that evidence be relevant, the general exclusions of tendency and coincidence evidence or that the general discretions and mandatory exclusions that apply, including if evidence's probative value outweighs the danger of unfair prejudice to the defendant.[181]

However, Mr Speakman does confirm that:

> The Bill will not mean that all relevant tendency or coincidence evidence will be admissible in a child sexual offence prosecution, as this evidence will not always overcome the legislative bar of the fist or second limb of the tests for admissibility. This is appropriate as safeguards should remain in place to protect an accused person's right to a fair trial.[182]

It is clear that the amendments made by the introduction of sections 94(4) and (5), 97A and 101(2) have lowered the bar for the admission of child sexual offences significantly but 'require significantly more substantiation'.[183]

The question for parliament will be whether these amendments strike the correct balance between the experience of sexual assault victims and observed patterns in offending conduct and the need to ensure a fair trial for an accused.[184] Further arguments and comparisons with England on how low the bar has gone will be discussed in Chapter VI.

I *Conclusion*

Except for Queensland, the other Australian jurisdictions have moved away from the common law test of *Pfennig*. This decision, for policy reasons, was made not only to improve but to also increase the admission of propensity evidence due to the bar for admissibility under *Pfennig* being so high. The *Pfennig* test of 'no reasonable explanation consistent with innocence' as criticised by McHugh J, effectively requires the defendant to be guilty. However, Western Australia adopted McHugh J's dissenting opinion in *Pfennig*, which argued for a lower public interest test. The UEL's stance can be referenced to the case of *Ellis* where Spigelman CJ stated that even though the formulation of the 'substantially outweighs' test under section

[180] Speakman (n 118) 7.
[181] Ibid.
[182] Ibid.
[183] Jill Hunter and Richard Kemp, 'Proposed Changes to the Tendency Rule: A Note of Caution'(2017) 41 *Criminal Law Journal* 253, 260.
[184] Ibid.

101(2) was similar to *Pfennig*'s 'no rational explanation' test, it was still a different standard with the difference being that the *Pfennig* test obviated any real balance.[185] However, Spigelman CJ did not rule out the possibility of section 101(2) applying to the extent of *Pfennig*'s 'no rational explanation' requirement in cases where the facts called for a higher threshold.[186]

The South Australia test in section 34P for admitting evidence of discreditable conduct appears stricter than *Pfennig* and the tendency and coincidence test under the UEL, but section 34P(2) lowers the bar to under the common law threshold. As mentioned, Western Australia adopted the public interest test which, until 2020, was the lowest bar for the admission of propensity evidence in Australia. The addition of sections 94(4) and (5), 97A and 101(2) amendments made to the UEL in New South Wales and the Northern Territory, have significantly lowered the bar past the public interest test in Western Australia and potentially past the bar set in England with the CJA amendments. However, these amendments are only applicable for child sexual offences and as yet, have not been adopted by any of the other UEL states.

Notwithstanding the range of tests for the admissibility of propensity evidence as depicted in table 3, which were driven by policy reasons to make it easier to admit propensity evidence, the bar for admission is still high, with the notable exception of section 97A in New South Wales, the Northern Territory and the Australian Capital Territory for child sexual offences. New South Wales, the Northern Territory and the Australian Capital Territory are now the three closest jurisdictions to England as regards the admission of propensity evidence.

As mentioned earlier, the Law Reform Commission report on admitting propensity and relationship evidence in Western Australia[187] based their recommendations on the understanding that Western Australia would be adopting the UEL in 'other respects', signalling the adoption of the UEL's approach to tendency and coincidence evidence, rather than inserting a reformulated version of section 31A.[188] This would include the adoption of sections 97A and 101(2). However, the Western Australian Law Reform Commission recommendations differ from that of other UEL section 97A recommendations in that they 'do not agree that [section 97A] should not be restricted' to child sexual offences. They believe that 'the tendency and

[185] *Ellis* (n 120) 717-18 [95] (Spigelman CJ).
[186] Ibid 718 [96] (Spigelman CJ).
[187] WALRC (n 161).
[188] Ibid 1.

coincidence provisions should be available to assist in proving all offences, whether they are of a sexual nature or otherwise'.[189]

If this recommendation is implemented, Western Australia would become the first state to lower the propensity bar to a level unprecedented in Australia.

Effectively, except for section 97A, Australian jurisdictions have been tinkering with the admission bar for propensity evidence, as depicted in table 4, while leaving bad character evidence unchanged and unsatisfactory from (a) a consistency perspective and (b) a level playing field for victims and defendants.

Furthermore, all jurisdictions in Australia persist in treating propensity evidence separately from general bad character evidence. Such separate treatment has its origins in the historical development of the common law in England. Ironically, England has abolished the separation of bad character and propensity evidence since 2003, yet Australia has shown no interest in adopting the revolutionary reforms in England out of apparent inertia rather than policy.

[189] WALRC (n 161) Recommendation 2, 11 [3.1].

CHAPTER IV: THE HISTORY OF EVIDENCE RULES IN ENGLAND AND WALES

> *'... conditions have so changed since the development of the modern law of evidence in the early nineteenth century, that it can now become more of an instrument for the discovery of truth and less of a counterweight to balance the unfairly advantageous position of the prosecution'.* [190]

A *Overview*

The history and evolution of the *Criminal Justice Act 2003* 'CJA' in England show that the changes made were designed to be radical and to have an impact on the admissibility of bad character and propensity evidence. However, only after new legislation comes into force will the real impact on the criminal justice system emerge through decided cases as the courts interpret the new legislation.

The English law before 2003, in relation to prior convictions, was the same as that currently in Australia, as seen in Table 1, in that a defendant with a clean criminal record could adduce his or her good character as evidence with the intention of persuading the court that he or she was less likely to have committed the offence charged. However, a defendant whose character was bad, could not in general, have this used in evidence against him or her unless relevant to the case or the defendant had lowered the shield against the Crown using his or her prior convictions.

As previously discussed in Chapters II and III, Australia's bad character and propensity evidence rules were the same as England and Wales in that prior conviction evidence could not be adduced unless the 'shield' came down under certain circumstances.

These circumstances include; (i) the proof that he has committed or been convicted of such other offences is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) He has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) He has given evidence against any other person charged with the same offence.

[190] Criminal Law Revision Committee, *Evidence (General)* (Report 11, 1972) (Colin Tapper) ('CLRC')

The reasoning behind the exclusion of prior convictions was (1) the principle that a defendant is tried on the charges before the court and not on their prior convictions and; (2) its prejudicial effect would outweigh their probative value.

Propensity evidence, on the other hand, was an exception to the bad character rule when evidence of the defendant's propensity could be admitted. As depicted in table 1 Chapter I, the starting point in the history of the appropriate test for the admission of propensity evidence was *Makin*, which was followed by a series of cases culminating in *Boardman*.[191] The test in *Boardman*[192] was set out by the House of Lords who held that in order to be admissible, the propensity evidence must bear a striking similarity to the facts of the case currently before the court.

Bad Character Evidence in England and Wales Pre 2003 (*Criminal Evidence Act 1898*)

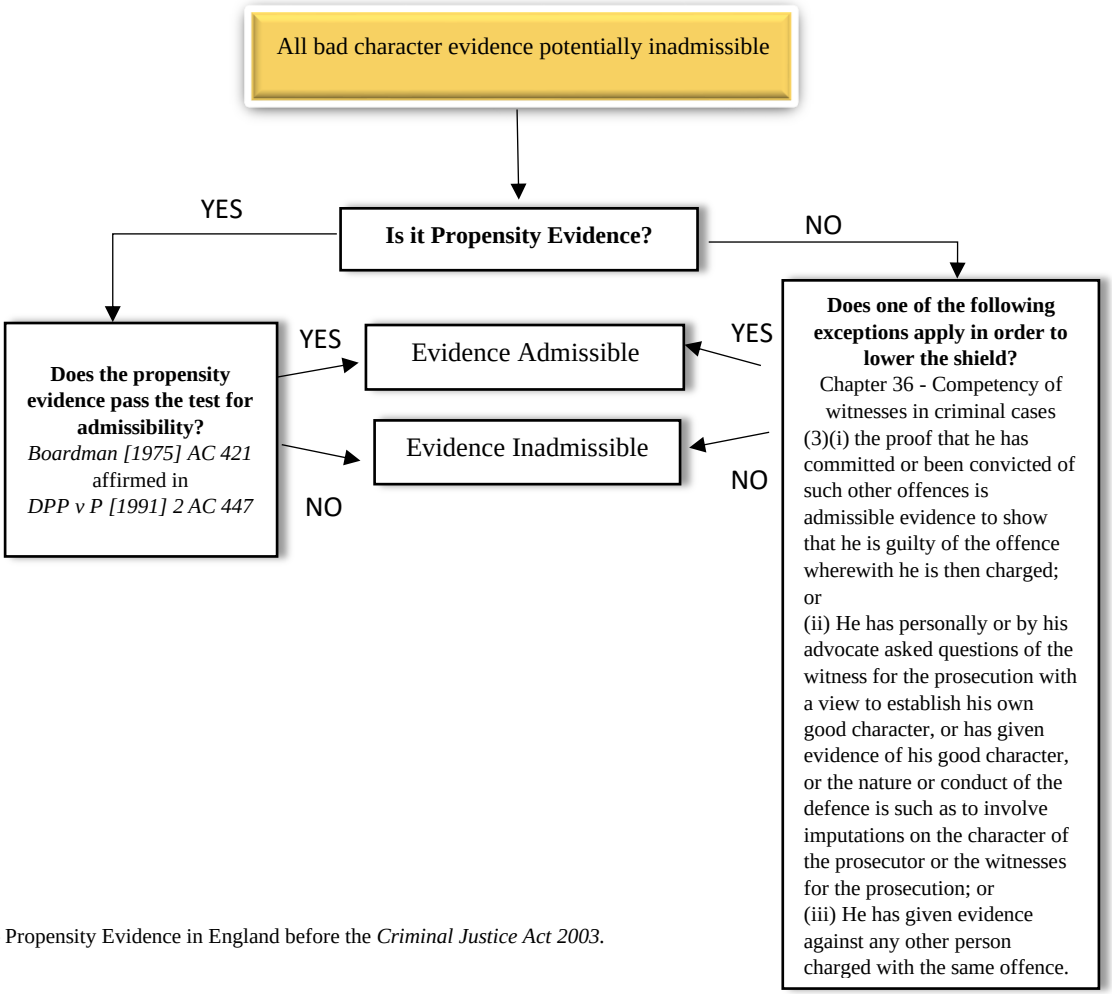

Table 5 – Propensity Evidence in England before the *Criminal Justice Act 2003.*

[191] [1975] AC 421.
[192] Ibid.

The test identified by Lord Wilberforce in *Boardman* on the admission of propensity evidence is:

> The basic principle must be that the admission of propensity evidence…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).[193]

This test was affirmed by the House of Lords in *DPP v P*[194] where Lord Mackay L.C said that 'whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree'.[195] This expanded on what was already laid down in *Boardman* in that 'some forms of propensity evidence will be more obviously admissible than others'.[196]

This Chapter will discuss and explain not only the evolution of the CJA but also how the interpretation of the new bad character provisions in Part 11, which included propensity evidence, affected legal outcomes in England and Wales, and whether this interpretation was expected or intended by the government.

The table below demonstrates the flow of the admissibility of bad character evidence in England since the 2003 CJA amendments were introduced.

[193] *Boardman* (n 77) [444].
[194] [1991] 2 AC 447.
[195] Ibid [460-461].
[196] David Field, 'A Statutory Formulation for the Admission of Similar Fact Evidence Against a Criminal Accused' (PhD Thesis, Bond University, 2014.

Flow Chart of Bad Character Evidence in England and Wales Post 2003

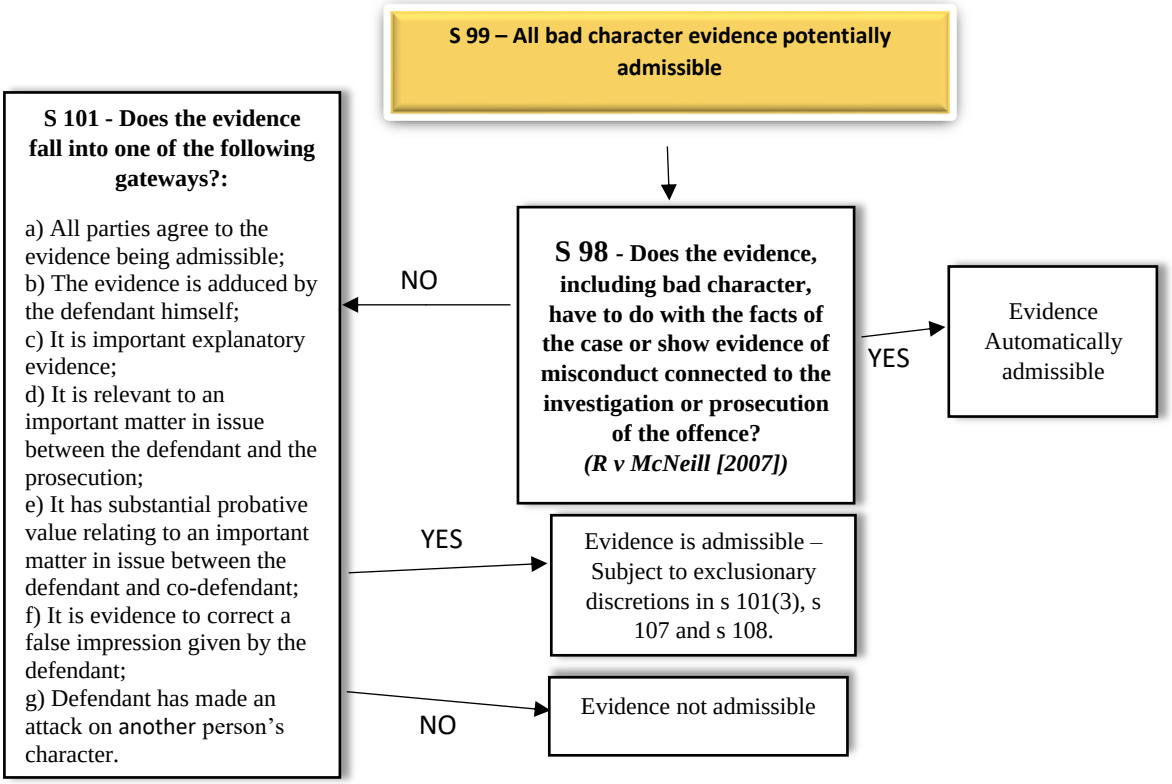

Table 6 - Flow Chart of Bad Character Evidence in England.

The courts have interpreted the new legislation consistent with the overarching fundamental principle that the defendant receives a fair trial, notwithstanding that the defendant is now exposed under the CJA to a higher level of admissible bad character evidence.[197] Arguably, such an even-handed interpretation by the courts has led to there being little public pressure to give a reference to the Law Reform Commission to review the operation of the CJA.

B *The History And Development Of The Criminal Justice Act 2003 (E & W)*

From 1972 to 2001, the government of the day sought to address the limitations of the laws of evidence by commissioning reports from the Criminal Law Revision Committee 'CLRC' and the Law Commission 'LC', as well as by establishing a Royal Commission 'RC'

[197] J R Spencer, *Evidence of Bad Character* (2nd edn, Hart Publishing 2009) does examine the provisions, but it is a more general overview of the topic as cited in Aparna Rao, 'The Defendant's Bad Character in the Wake of the CJA' (PhD Thesis, Magdalen College, 2013) 16.

on the criminal justice system. The CLRC published its eleventh report on evidence in 1972 after eight years of preparation, which was described as 'the most comprehensive review of the law of evidence ever undertaken in [the United Kingdom]'[198] and 'its recommendations [were] far-reaching and, in some respects, revolutionary'.[199] In this report, the CLRC believed that the three official bodies[200] involved in law reform, at the time, were performing in an 'unsatisfactory' manner, including in relation to the reform of the law of evidence.[201]

The CLRC's 1972[202] General Report referred to above included recommendations on propensity evidence, which languished on the shelf until the Royal Commission on the Effectiveness of the Criminal Justice System published its Report in 1993[203] and endorsed the CLRC's recommendations on propensity evidence. As a result, in 1994, the Law Commission received a reference from the Home Secretary to review the law regarding evidence of previous misconduct in criminal proceedings however this was not published until 2001.[204]

The key recommendation of the CLRC report was that where a defendant denies his or her conduct constituted an offence, evidence of other conduct showing such a disposition would become admissible. This report stated that:

> only changes which improved the position of the defence [were going to be] considered' and 'the desire to compromise has led to the formulation of novel and frequently ingenious proposals, such as the isolation and definition of the three circumstances in which propensity evidence merely showing the disposition of the accused is admissible…[205].

This report was also produced under the expectation that at some point, 'the Law Commission [would] codify the whole law of evidence'.[206]

Twenty-one years later in 1993, the Government directed the Royal Commission to 'examine the effectiveness of the criminal justice system' in England and Wales in order to

[198] CLRC (n 190) 621.
[199] Ibid.
[200] The Criminal Law Revision Committee, the Law Reform Commission, and the Law Commission
[201] CLRC (n 190) 621.
[202] Ibid.
[203] Royal Commission on Criminal Justice (UK), *Effectiveness of the Criminal Justice System* (Cm 2263, 1993) ('RC').
[204] Law Commission, *Evidence of Bad Character in Criminal Proceedings (Summary)*, Report No 273, October 2001). ('LC')
[205] CLRC (n 190) 624.
[206] CLRC, (n 190) 621.

'secure the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources'.[207]

The RC agreed with the CLRC on allowing prior convictions to be introduced by the prosecution where the accused admits conduct of which he or she is accused but denies any criminal knowledge or intent and stated that:

> … when a defendant admits the basic facts alleged by the prosecution and the question is only one of knowledge or intent, the fact that he or she has previous similar convictions should be made known to the jury. We recommend that the CLRC's proposals in this regard be implemented.[208]

In addition, where a defendant claims to be of blameless reputation the prosecution can be allowed to prove otherwise by cross-examining on previous convictions, 'we accept, that where a defendant claims to be of blameless reputation, it must continue to be possible for the prosecution to prove that this is not so by being able to cross-examine on previous convictions'.[209]

Evidence of prior convictions of the defendant would also be allowable should the defendant attack the credibility of a prosecution witness: 'Similarly, we see no reason for abolition of the general rule that, if the defendant attacks the reputation or character of a prosecution witness, he or she should be open to similar attack from the prosecution'.[210]

The RC also included that their reasoning behind recommending the introduction of a defendant's previous convictions was, '[the] purpose…is to impugn a person's credibility as a witness, however if a person does not go into the witness box, he or she is not a witness and therefore the question of his or her credibility does not arise'.[211] And that, 'if a defendant attacks the credibility of a prosecution witness, it must be possible for the prosecution to lead evidence of the defendant's previous convictions, even if the defendant has not given evidence'.[212]

In 1994, the LC recommended that evidence that has to do with the offence or shows evidence of misconduct, including bad character, should be adduced freely without restrictions.

> … we recommend is the idea that, in any given trial, there is a central set of facts about which any party should be free to adduce relevant evidence without constraint – even evidence of bad character.

[207] RC (n 203) 29.
[208] Ibid 126 [31].
[209] Ibid 126-127 [33].
[210] Ibid.
[211] RC (n 203) 34.
[212] Ibid.

> Evidence falls within this central set of facts if it has to do with the offence charged or is of misconduct connected with the investigation or prosecution of that offence. We recommend that evidence of bad character which falls outside this category should only be admissible if the court gives leave for it to be adduced.[213]

The LC's aim was to 'construct a consistent and balanced process under which the conflicting interests of the various parties may best be advanced and protected, and the fairness of the criminal trials generally enhanced'.[214] In doing so, any probative value that shows that the defendant has the propensity to be untruthful, leave may not be given unless 1. the defendant has suggested that another person has the propensity to be untruthful; 2. The defendant adduces evidence of bad character which falls outside the central set of facts and 3. without the evidence of the defendant's bad character the factfinder would get a misleading impression of the defendant's propensity to be untruthful in comparison with that of the other person. [215]

However, leave may be given if the defendant is responsible for an assertion which creates a false or misleading impression about the defendant, the evidence has substantial probative value in correcting that impression and for the interests of justice, require it to be admissible, even taking account of its potentially prejudicial effect.[216]

Further recommendations were that leave may be given to a co-defendant (D2) to adduce evidence of the bad character of a defendant (D1) if the evidence has substantial probative value in relation to a matter in issue between D2 and D1 which is itself of substantial importance in the context of the case as a whole.[217]

Whereas the earlier reports by the CLRC and the RC had made recommendations based on evidence in general and criminal justice, the LC report's focus was on allowing the introduction of propensity evidence and previous misconduct.

Despite these reports recommending reform in the area of prior convictions, the evidence laws of England remained unchanged until the Labour Government reassessed the situation by taking forward its policy on crime, culminating in a White Paper entitled 'Justice for All', published in 2002. The three strands of policy they wanted to clearly address were the need for effective detection, conviction, and punishment of criminals; the need to modernise

[213] LC (n 204) 4 [1.12].
[214] Ibid [22].
[215] Ibid [8].
[216] Ibid [9].
[217] LC (n 204) [10].

the criminal justice system; and the need to rebalance the system in favour of the victims of crime.[218]

The Government was known to want reform of the legal principle that keeps a jury in the dark about a defendant's criminal past, which was evident in the case of Sarah Payne where prosecutors were refused permission to adduce evidence of the defendant's past convictions showing 'striking similarities' to the Payne case.[219] Sarah Payne disappeared in 2000 after playing near her grandparents' house. Roy Whiting was arrested and later charged with her murder. Whiting had previously been jailed and placed on the Sexual Offenders Register in 1995 after abducting and sexually assaulting a nine-year-old girl. Only after Whiting's trial for Sarah's murder did his previous crimes come to light. [220] The media often used the case of Sarah Payne as an example as to the reason for the Government introducing the new policies[221] and as can be seen from the extract below, from the reformed CJA, a combination of sections 101(3)(d), 101(3)(a), 103(2) and 103(4)(b), would have had the effect of allowing the prosecution to adduce evidence of Whiting's past convictions against a person under 16 years of age.

Under section 103(1)(a) of the CJA, for the purpose of section 101(1)(d) which deals with a 'matter in issue between the defendant and the prosecution' includes:

> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged.

Then, under section 103(2), this propensity can be established by evidence that the defendant has been convicted of:

> (a) an offence of the same description as the one with which he is charged, or
> (b) an offence of the same category as the one with which he is charged.

For the purpose of section 103(2), section 103(4)(b) states that 'two offences are of the same category as each other if they belong to the same category of offences prescribed for the

[218] John D. Jackson, Justice for All: Putting Victims at the Heart of Criminal Justice, *Journal of Law and Society* (Vol 30, No. 2, June 2003) 309.
[219] BBC NEWS, '*Law on Previous Convictions May Change'* (online, 12 December 2001).
[220] Crime Investigation, 'The Murder of Sarah Payne: 20 Years On' (online, 2020) The murder of Sarah Payne: 20 years on | Crime + Investigation UK (crimeandinvestigation.co.uk)
[221] Sarah Brown and Beverley Steventon, 'The Admissibility of Bad Character Evidence' (2008) *Coventry Law Journal* 1 (1).

purposes of this section by an order made by the Secretary of State. Under secondary legislation, Categories of Offences (Order) 2004, Part 2 of the Schedule of prescribed Categories of Offences deals with sexual offences against persons under 16 years of age.

The White Paper, as mentioned above, was based on expressed concerns that half of all crime is never reported by victims and few people are willing to report the crimes they witness.[222] This White Paper, as will be discussed below, was influenced by two other reports published in 2001, the Auld Report and Criminal Justice: The Way Ahead, both forming the basis of the CJA (see Appendix C for the timeline of reports).

Despite the rules excluding prior conviction evidence, the principle of not trying someone on their prior convictions is not absolute. It is apparent that England and Wales were prepared to abandon this principle, which Australia has, as yet, not been prepared to embrace, and begs the question of whether Australia will need its own equivalent of the Sarah Payne case to act as a catalyst before prior conviction reform is addressed.

C *Justice For All White Paper*

The White Paper 'Justice for All' 'represents the Government's view as to what should be done to modernise and improve the criminal justice system so its aims can be achieved more effectively' as 'too few criminals are caught, convicted or prevented from reoffending'.[223] The White Paper was designed to 'send the strongest possible message to those who commit crimes that the system will be effective in detecting, convicting and properly punishing them'.[224] The White Paper argued that the current rules of evidence were too complex which has created public concern that evidence which could help disclose the truth, was being wrongly excluded.

A central goal was 'rebalancing the criminal justice system in favour of the victim',[225] and more specifically to 'allow the court to be informed of a defendant's previous convictions where appropriate'.[226] One of the recommendations made in the White Paper was that:

> Magistrates, judges, and juries should be trusted to give appropriate evidence the weight it deserves when they exercise their judgement. To enable them to do so, the rules of evidence need to be

[222] The police successfully detect only 23% of recorded crime; under-reporting of racist crimes and domestic violence remains a concern, United Kingdom, *Justice for All* (Cm 5563, 2002) 12 [24]; John D. Jackson, Justice for All: Putting Victims at the Heart of Criminal Justice, *Journal of Law and Society* (Vol 30, No. 2, June 2003) 311.
[223] United Kingdom, *Justice for All - Forward* (Cm 5563, 2002) ('Justice for All')
[224] Ibid.
[225] Justice for All (n 223) Executive Summary, 11.
[226] Ibid 12.

> rewritten to ensure that they have all relevant material to help them to reach a just verdict. The rules should be coherent, consistent, and realistic for today's Criminal Justice System.[227]

This stance was also taken by independent commentators in Australia, such as Chief Justice of the Supreme Court of Queensland de Jersey, which raises the question as to why the recommendations to trust the triers of fact to give prior convictions the weight they deserve would not equally apply in Australia and will be discussed further in Chapter VI.

It was favoured by the English Government to 'entrust relevant information to those determining the case as far as possible and… it should be up to the judge to decide whether previous convictions are sufficiently relevant to the case, bearing in mind the prejudicial effect, to be heard by the jury and for the jury to decide what weight should be given to that information in all the circumstances of the case'.[228] The approach they decided to take on this issue was, 'where a defendant's previous convictions, or other misconduct, are relevant to an issue in the case, then unless the court considers that the information will have a disproportionate effect, they should be allowed to know about it….'[229]

Such an approach circumvents the previous problem of determining exactly when an attack by the accused on the prosecution results in a lowering of the shield. This issue was discussed in Chapter II, where King CJ's judgement in *P v The Queen*[230] was considered. Unlike Australia, England has addressed that problem by reversing the onus between the parties. Thus, in England, there is now a rebuttable presumption that prior convictions are admissible, and the defence needs to be aware of the circumstances when the shield will come up, rather than the reverse, as in Australia.

'Justice for All' recommended that previous convictions be allowed to be introduced at trial, reflecting an approach by the Government to send the message that those who choose to offend will face a situation where their past criminal history could be introduced, and the possibility of longer sentences could result, in an effort to try and prevent the crimes from occurring in the first place (see Appendix C). The White Paper laid the foundation for reforms for the CJA.

[227] Ibid 79 [4.53].
[228] Ibid 80 [4.56].
[229] Ibid 82 [4.57].
[230] [1993] 61 SARS 75.

D *The Current Law – The Criminal Justice Act 2003 (E & W)*

The CJA received Royal Assent on the 20th of November 2003 and officially implemented changes based on the previously discussed White Paper 'Justice for All', with the focus on reforming court procedures and sentencing to make trials faster and to deliver clear, consistent, and appropriate sentencing. However, the most radical changes were made to the rules on adducing a defendant's bad character evidence in the form of sections 98, 99 and 101 to 105 (see Appendix D).

The Act extensively changed the laws regarding the admissibility of a defendant's previous convictions and other misconduct, broadening the circumstances in which prosecutors could introduce these matters. These new rules were placed in Chapter 1 Part 11 and were intended to replace both the common law and most existing general statutory provisions.[231] Not only does this Act detail the grounds where bad character evidence may be presented, but also abolishes the common law rules under section 99(1) which was the most significant change to the law of evidence and where the discussion on the framework to this legislation will begin.

Looking at the impact the revised bad character provisions of the CJA produced will give an indication as to how similar provisions could be implemented in Australia to address the difficulties of separate bad character and propensity rules, compared to England, which decided to combine prior convictions into propensity. Each new relevant provision from Part 11 of the CJA will now be discussed.

E *Sections 98, 99 And 101*

Section 99(1) states that 'The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished'. This was a major change as England had been under the common law rules for over 100 years, however, section 99(1) only applies to 'bad character' which the Act defines in section 98 as:

> evidence of, or of a disposition towards, misconduct on… [a person's], other than evidence which-
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

[231] Roderick Munday, 'Chapter VIII Bad Character of the Accused' in Cross & Tapper (ed) *Cross & Tapper on Evidence* (Research Gate Publication) 381.

However, if there is evidence of misconduct which does fall outside the definition of bad character in section 98, it could potentially be admitted, but only if it fits into one of the section 101 gateways, which is discussed shortly.

Because of this, it is therefore critical to identify what evidence is included under the 'has to do' with the interpretation of section 98(1) because should it relate to the alleged facts, it will not be subject to the statutory regime of gateways and safeguards provided by the Criminal Justice Act.[232] In the case of *R v McNeill* [2007] EWCA Crim 2927, it was said that the words of the statute 'has to do with' are words of broad application and constitute a phrase that has to be construed in the overall context of the bad character provisions.[233] However, the line between what evidence 'has to do' with the alleged offence and the admissibility of evidence which may be considered through the gateways is considered very fine.[234] For example, in *R v Okokono*[235] evidence of a previous conviction for possession of a knife would be considered 'highly relevant' to a charge of a gang-related killing applying section 98(a) but would also have been admissible under one of the statutory gateways.[236] Similarly, in *R v Demoy McKintosh*[237] (*R v M*), the court said that the evidence, by the complainant in a rape case who was cross-examined on why no complaint was made and that she entered into the attacker's car afterward, 'had to do' with the facts of the alleged offence.[238] Therefore, it did not come within the provisions of section 98 (which defines bad character) because it is excluded as evidence which has to do with the alleged facts of the offence. That line of questioning permitted her evidence of previous threats to shoot her and, her belief that M had a gun to be admissible.[239] The court said that this evidence 'had to do with' the act of the alleged offence, but if not, would have been admissible under gateway (c) as 'important explanatory evidence'[240], and under gateway (f) 'to correct a false impression' given by the defendant.[241] The court was satisfied that the cross-examination was admissible through section 101(1)(c) and observed that,

> if the submissions in this matter were right, the complainant would have been prevented from giving an explanation for conduct which was regarded as significant by the appellant's counsel at

[232] The Crown Prosecution Service, *Bad Character Evidence* (2021) 2 ('CPS').
[233] Ibid.
[234] Ibid 3.
[235] [2014] EWCA Crim 2521
[236] CPS (n 232) 3.
[237] [2006] EWCA 193.
[238] Ibid [24] (Lord Justice Gage).
[239] CPS (n 232).
[240] *R v M* (n 237) [24] (Lord Justice Gage).
[241] Ibid [29] (Lord Justice Gage).

> the time. For these reasons, we have reached the conclusion that the ground of appeal fails and that the conviction was safe.[242]

The impact of defining bad character now provides the prosecution and defence with the steps in determining whether their evidence falls into this category, but only if it had to do with the alleged facts of the case. The decision to define bad character seems proven to have worked as no modifications to not only the definition but also the legislation has been made since enactment.

Section 98 is supplemented by the definition of misconduct in section 112(1) to mean the commission of an offence or other reprehensible behaviour and while bad character evidence usually takes the form of convictions, it may also include evidence of offences that have not resulted in prosecution or conviction.[243]

This definition of 'bad character' is based on the definition proposed by the Law Commission, as discussed in section D, but differs from it in two respects. The first is that the Act defines 'misconduct' as 'the commission of an offence *or other reprehensible behaviour*', whereas the equivalent in the Law Commission's scheme was the commission of an offence or '*behaviour that, in the opinion of the court, might be viewed with disapproval by a reasonable person*'.[244] The Law Commission's formula was used in the Bill, but the shorter 'other reprehensible behaviour' formula was substituted in Parliament, and this was done to meet an objection that the Law Commission's formula was too wide-and could result in too much evidence being admissible, to the detriment of the defendant.[245]

The second difference is that section 98 narrows the definition of 'bad character' in the Act so that it does not cover evidence of misbehaviour which is directly connected with the offence with which the defendant is charged, nor any misbehaviour during the course of the investigation or prosecution.[246] However shortly after the bad character provisions of the CJA came into force, concern was expressed that the definition of 'bad character' in section 98 is dangerously vague and some expressed the view that the phrase 'or other reprehensible behaviour' left the meaning of 'bad character' wide open, with potentially dire consequences:

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[242] Ibid [33] (Lord Justice Gage).
[243] Rudi Forston, *Where Are We Now Under the CJA 2003?* (2006) Butterworths Criminal Law Summer School [32] http://www.rudifortson4law.co.uk/legaltexts/Where_are_we_now_under_the_CJA_2003_Sept_2006.pdf.
[244] J R Spencer, *Evidence of Bad Character* (2016) Hart Publishing, 36.
[245] Ibid.
[246] Ibid.

'no matter how hard the court endeavour to steady the ship, the CJA will prove a nightmare of interpretation'.[247]

By section 99(1) abolishing the common law and removing the shield previously provided, it opened up the ability to admit all forms of bad character evidence as well as most general statutory provisions relating to the admissibility of bad character evidence.[248] However, section 99(2) does preserve the common law rule relating to proof of reputation as a means of proving bad character.[249]

F *The Seven Gateways*

Section 101(1) of the CJA provides that evidence of a defendant's bad character is admissible, but only if it passes through one of seven specified gateways. The primary focus of this Chapter will be on gateway (d): 'it is relevant to an important matter in issue between the defendant and the prosecution'. Other gateways which will be mentioned include:

> (e) it has substantial probative value in relation to an issue between the defendant and a co-defendant
> (f) it is evidence to correct a false impression given by the defendant
> (g) the defendant has made an attack on another person's character.

Section 101(1)(d) had the intention of replacing[250] the existing propensity evidence regime. This section provides that evidence of misconduct can be adduced by the prosecution (s 103(6)) only if relevant to an 'important matter in issue between the defendant and prosecution'. This section is given clarification in section 103(1)(a), which provides a non-exhaustive description of such 'matters' and will be discussed below. Section 101 is supplemented with section 101(3) and (4):

> 101 (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it and;

[247] Roderick Munday, 'What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the CJA?' [2005] *Crim LR* 24.
[248] Sch 7, Pt 5.
[249] Rules excluding bad character evidence on other grounds are preserved by s 112(3)(c).
[250] The word 'replacing' is used at this time to signify the abolition of the common law and the replacement by s 99 and s 101.

(4) On an application to exclude the evidence under subsection (3) the court must have regard to the length of time between the matters to which that evidence relates and the matters which form the subject matter of the offence charged.

Questions being raised at the time of enactment included whether section 101(1)(d) would liberalise the common law by making previous misconduct easier to adduce and thereby increase the risk that the defendant would be found guilty not on the facts of the case, but on his or her past criminal history. The Law Commission report in 2001 was unable to identify positively whether the recommended scheme would allow more or less bad character evidence to be adduced when considered *overall*, however, it was clear that less evidence of a defendant's previous bad character would be admitted on the issue of credibility. Though this might appear to be a counterbalance, this new Act was a significant liberalisation from the old law which suggests that the Law Commission anticipated establishing those guilty of misconduct, easier to adduce.[251]

Section 103 provides an important interpretation of gateway (d) in specifying that the matter in issue between the defendant and prosecution includes 'the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence', as well as 'the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect'.[252] Section 103 continues by detailing ways in which a propensity to commit the current crime can be proved when 'the question whether the defendant has a propensity to commit offences of the kind with which he is charged' is deemed to be an important matter in issue, the defendant's propensity:

103 (2) …may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of –

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(4) For the purposes of subsection (2) –

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms.

[251] Gregory Durston, 'The Impact of the CJA on Similar Fact Evidence' (2004) 68 (Part 4) *Journal of Criminal Law* 307 [309].

[252] M. Redmayne, *Character in the Criminal Trial* (2015) Oxford University Press, 146 [7.1].

> (b) two offences are of the same category as each other if they belong to the same category of offence prescribed for the purposes of this section by an order made by the Secretary of State.[253]

Previous convictions are focused on in section 103, but gateway (d) provides a much wider stance. Section 101, which contains gateway (d), refers to 'evidence of a defendant's bad character' and 'bad character' is defined in section 98 as 'evidence of, or a disposition towards misconduct'; 'misconduct' is further defined in section 112(1) as 'the commission of an offence or other reprehensible behaviour'.[254] As has been pointed out, 'reprehensible behaviour' is not the most transparent way of defining the concept around which the bad character provisions of the Act revolve.[255]

The Crown Prosecution Service was of the view that evidence of previous misconduct that has relevance to an issue in the case, should be admitted in order to give courts and juries the fullest possible relevant information for them to determine guilt or innocents. They noted some key points regarding section 101(1)(d) which were that firstly, that facts in issue are those necessary by law to establish the offence or defence, and that facts relevant to an issue are those which tend directly or indirectly to prove or disprove a matter in issue. Secondly, relevance to an important matter in issue means 'a matter of substantial importance in the context of the case as a whole' (this is the definition provided in section 112 of the CJA) and that "substantial" means more than minor or trivial as in non-defendant's bad character. Thirdly, if the evidence is relevant to an issue in the case, it passes the threshold for admissibility. There is no requirement for the evidence to have any 'substantial probative value'. And fourthly, section 101(1)(d) should be read in conjunction with section 103 when deciding what is a "matter in issue", which includes but is not restricted to whether a defendant has a propensity to commit offences of the kind with which he is charged except where his having such a propensity makes it no more likely that he is guilty of the offence (section 103(a)), and whether a defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect (section 103(b)). [256]

[253] Section 103(5) provides that 'a category prescribed by an order under sub s (4)(b) must consist of offences of the same type'. 'Type' is not further defined; Two categories of offences have been specified by the Secretary of State under s 103(4)(b): a property offences category, which includes theft, robbery, burglary, taking vehicles without consent, and such like; and a category covering underage sex offences: CJA (Categories of Offences) Order 2004, SI 2004/3346.
[254] Redmayne (n 252) 147.
[255] Munday (n 231).
[256] CPS (n 232).

Section 101(1)(d) demonstrates how the re-structure of the old provisions has simplified the ability to adduce evidence to not only help convict the guilty, but also ensure that evidence is adduced correctly and reduce innocent people being convicted by levelling the playing field for both the prosecution and the defence.

In addition to the restructuring of the old common law rules, the 'fairness' test in section 103(3) was included.

While the primary focus is on section 101(1)(d), two other sub-sections ('gateways') are relevant to this thesis, section 101(1)(e) and section 101(1)(f). Section 101(1)(e) states that a defendant's bad character is admissible if it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant. This is equivalent to Australia's section 15(2)(d) in that should the first defendant attack the second defendant, the shield for defendant one will come down. However, the use of the word 'substantial' in section 101(1)(e) is "slightly more restrictive than is used in section 101(1)(d), where bad character is admissible if 'it is relevant to an important matter in issue between the defendant and the prosecution"'.[257]

When looking at the use of section 101(1)(e), the appeal case of *R v Phillips*[258] against a conviction for conspiring to commit fraud, the grounds of the appeal were that the trial judge wrongly refused *Phillips* leave under section 101(1)(e) to adduce evidence of the bad character of two of his co-accused. It was argued that this resulted in an unfair trial.[259] If the conditions of section 101(1)(e) and section 104 are met, the court is obliged to admit the evidence that the first defendant wishes to use against the second defendant.[260]

Section 101(3), which requires the court to exclude bad character evidence, applies only to bad character evidence admissible through gateways (d) and (g), and hence does not apply to evidence admissible under gateway (e).[261] In general terms, the courts have the discretion to exclude otherwise admissible evidence of bad character due to an absence of general discretion under gateway (e) because:

> [A]s was pointed out in Phillips, a court confronted by a defendant who wishes to adduce against his co-defendant some highly prejudicial piece of bad character evidence the relevance of which is marginal, or which is tenuous and will give rise to satellite issues disproportionate to its evidential

[257] Spencer (n 244) 115 [4.107].
[258] [2012] 1 Cr App R 25.
[259] *Phillips* (n 258) [3] (Lord Justice Pitchford).
[260] Spencer (n 244) 119 [4.117].
[261] Ibid.

> value, is not left completely powerless. In order to open 'gateway (e)', section 101(1)(e) requires the evidence to have 'substantial probative value' in relation to 'an important' matter in issue between the defendant and a co-defendant. If the bad character evidence is only marginally probative or is probative only in relation to some minor matter, then the judge should rule that it does not satisfy the conditions for admissibility under section 101(1)(e). [262]

Further examples of the requirements under section 101(1)(e) for the evidence to have 'substantial probative value' can be seen in the case of *Assani*,[263] where evidence that the co-defendant had been involved in a minor incident of violence 14 years prior, was considered too 'thin' and the trial judge's decision to refuse admittance was endorsed by the Court of Appeal.[264] In *Land and Kalq*[265], the first defendant sought to adduce evidence of Defendant Two's previous convictions to 'bolster' his defence of duress from Defendant Two. However, the Court of Appeal refused to admit this evidence because it added 'little or nothing' to the case.[266] In *Edwards and Rowlands*[267] the Court of Appeal indicated that evidence adduced by defendant one of defendant two's minor prior convictions should have been excluded by the trial judge as they were 'insignificant in relation to the real issue in the case'.[268]

Evidence led by defendants to show the bad character of their co-defendant/s was required to give notice, therefore, should defendant one attempt to ambush defendant two with evidence that he or she cannot counter, it is proper for the judge to refuse to admit it.[269] The Court of Appeal in *Mitchell*[270] said, where such evidence is admitted, the judge should intervene to prevent excessive use of it during cross-examination.[271] Consequently, it appears that the threshold for admissibility under section 101(1)(e) is higher than it was previously under the *Criminal Evidence Act 1898* and if applied correctly, the risk of unfairness is lessened.[272]

Section 101(1)(f) states that a defendant's bad character is admissible if it is evidence to correct a false impression given by the defendant. In *R v Renda*[273], the defendant was heard

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[262] Ibid [4.118].
[263] *Assani* [2008] EWCA Crim 2563.
[264] Spencer (n 244) 119 [4.118].
[265] *Land and Kalq* [2006] EWCA Crim 2856.
[266] Spencer (n 244) 119 [4.118].
[267] *Edwards and Rowlands* [2005] EWCA Crim 3244.
[268] Spencer (n 244) 120 [4.118]; and see *Platt* [2016] EWCA Crim 4.
[269] Ibid; *Musone* [2007] EWCA Crim 1237.
[270] *Mitchell* [2010] EWCA Crim 783.
[271] Spencer (n 244) 120 [4.118].
[272] Maureen Spencer and John Spencer, Evidence Concentrate – Law Revision and Study Guide (2017) 104.
[273] (2006) 1 WLR 2984.

with five others on appeal against a conviction for attempted robbery. The issues in this appeal arose from evidence Renda sought in order to enhance his credibility. He did this by asserting that, while being a serving soldier, he sustained a head injury which resulted in long-term brain damage.[274] Evidence in the Crown's possession showed that although Renda has served in the armed forces, his head injury had been caused while on a holiday.[275] If this evidence was correct, then Renda was seeking to convey a misleading impression about his life and history including previous violent attacks that did not result in a conviction.[276] For the purposes of section 101(1)(f), the question was whether Renda has given a 'false impression' about himself and whether there was evidence which would properly serve to correct that false impression. The Court of Appeal held that he was rightly cross-examined under section 101(1)(f) on his 'reprehensible behaviour' and the appeal was dismissed.

In contrast to *Renda*, the court in *R v Somanathan*[277] referred to section 105(6) which provides that 'evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression'.[278] Somanathan was convicted of two offences of rape and wished to seek leave of the court to appeal his conviction. Lord Justice Kennedy stated that:

> We accept that a simple denial of the offence alleged cannot, for the purposes of section 101(1)(f), be treated as a false impression given by the defendant. But that was not the situation in this case. The appellant put himself forwards as a man who no only had no previous convictions, but also enjoyed a good reputation as a priest and was the victim of a conspiracy. That opened the gateway for the admission of evidence as to what happened, but he invited our attention to section 105(6). We accept [this] is a statutory reversal of the previous common law position that character is indivisible, but we do not accept [the] submission that all that was required, to correct the false impression, was for Mr S to state that the decision not to renew his contract was because of complaints being received. In our judgement, evidence was admissible under section 101(1)(f) because part of the false impression given by the appellant.. was that he was a priest who had never behaved inappropriately towards female worshipers.[279]

[274] Spencer (n 244) 277, Appendix V [16]; other Crown evidence material included Renda's antecedent history and police computer print-outs showing a number of reported crimes of violence.
[275] Spencer (n 244) 277, Appendix V [17].
[276] Ibid; Spencer and Spencer (n 272) 105.
[277] *R v Somanathan* [2006] 1 WLR 1885.
[278] *Criminal Justice Act 2003* section 105(6).
[279] *Somanathan* [43] (Lord Justice Kennedy).

Somanathan failed to substantiate any grounds and the appeal against his convictions was dismissed.[280]

As previously mentioned, section 101(1)(e) is equivalent to Australia's section 15(2)(d), but section 101(1)(f) is a category which is not addressed in Australia under section 15 of the *Evidence Act 1989* (Qld), which is being used as a proxy for the form of legislation adopted in Australia. However, there is a notable difference between the common law and the uniform evidence legislation (section 110) in Australia, and the codification effect sections 99 to 108 of the CJA had on England's evidence laws.

G *What Qualifies As 'Important Matter In Issue'?*

As with all legislation, the language used is the key to interpreting and applying the law. The wording of gateway (d), the most commonly used gateway, implements the words 'important matter in issue' to satisfy the criterion of admissibility.[281]

The phrase 'matter in issue' would normally mean ' a specific question of fact on which the prosecution and defence disagree,'[282] and this is clearly how it is used by section 101(1)(d). However, section 103(1)(a) uses these words in a looser fashion. Section 103(1)(a) appears to interpret these words to mean 'one of those matters which the court ought to consider when reaching its decision'.[283] This it seems, was to make the court consider 'whether or not he or she has the propensity to commit the sort of offence for which he or she is on trial'.[284] The difference in the meaning behind these interpretations gives rise to various arguments, which if accepted, would limit the effect of the provision.[285]

The first argument is that a matter is legally considered 'in issue' when the parties are disputing it. Assuming that 'matter in issue' regarding section 103(1)(a) means 'disputed issue', the propensity is a matter of degree, and where the defendant admits a propensity, there is still room for argument about how strong it is. Therefore, evidence of the defendant's previous convictions could still be used to shed light on the case.[286]

The second argument looks at the meaning of the word 'important' which qualifies the words 'matter in issue'. Section 103(1)(a) only allows evidence of bad character where it is

[280] *Somanathan* [54] (Lord Justice Kennedy).
[281] It is a named 'matter in issue' (ss 103(1)(a) and (b)) in respect of gateway (d).
[282] Spencer (n 244) 82 [4.30].
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid 83 [4.31].

'important', which must go beyond showing a mere tendency to commit this type of offence and illuminate some specific factual issue.[287]

One objection to this is that it would recreate the old common law, which was abolished by section 99(1), as well as the intention, when implemented by the Parliament, to widen the legislation.[288]

H *Support Given To 101(1)(d) By Section 103(1)(a)*

Section 103(1)(a) provides clarification on such 'matters' described in section 101(1)(d) and significantly includes inter alia the question as to whether a defendant has a 'propensity to commit offences of the kind with which he is charged'.[289] The defendant may have a propensity to commit crime if he or she has a desire to commit a particular crime, such as paedophilia. Proof of propensity is not limited to the commission of the same kind of offences but could include any evidence that made it more likely the defendant had behaved as charged. Propensity may be established, without prejudice to any other way of doing so, by showing evidence that the defendant has been convicted of; firstly, an offence of the same description as the one with which he or she is charged or secondly, an offence of the same category as determined by the Secretary of State. However, there are exceptions that evidence of propensity should not be admitted if there is an extended length of time since the last or previous conviction, or if the court is satisfied that it would be unjust to the defendant, to admit it. For evidence to be unjust, it must be regarded by the court as evidence (using for bad character for example), that has such an adverse effect on the fairness of the proceedings that the court ought not to admit it. This is the test in section 103(3), or what is called the 'fairness' test, as mentioned earlier.

Section 103(2) gives non-exhaustive guidance on how a defendant's propensity under section 103(1)(a) can be established by introducing evidence of previous conviction under the same 'description' or 'category' as the one with which they are being charged.
'Description' and 'category' are defined in section 104(4)(a)-(b).[290] The same 'description' includes offences, when both written in a charge or indictment, would be considered in the same terms, e.g., robbery and theft, and the same 'category' includes the two offence categories

[287] Ibid [4.32].
[288] Ibid.
[289] It should be noted that s 103(1)(b) makes it clear that s 101(1)(d) is not purely a replacement for similar fact evidence, as it also deals with a defendant's propensity to be untruthful as cited in Durston (n 234).
[290] Above n 253.

ordered by the Secretary of State which include offences relating to theft and also sexual offences of underage children.

Section 103(1)(a) provides clarification for evidence to be adduced under section 101(1)(d) and both are the most commonly used sections when the prosecution is dealing with propensity evidence. One of the first cases to use these new provisions was that of *Hanson*[291], which is still considered the leading case.

I *Interpretation Of The New Legislation By The Courts: Hanson*

There is no doubt that when Parliament decided to enact the new provisions in the CJA that they intended to change the law, and not by just codifying the law as it currently existed. As the Explanatory Notes clearly stated, 'The intention is that this Part of the Act will provide a new basis for the admissibility of previous convictions and other misconduct.'[292] The earliest interpretation in applying the new bad character provisions was in the case of *R v Hanson*[293] which provided guidance in which the prosecution relies on the defendant's propensity to commit offences.

<u>Test for admissibility section 101(1)(d) *R v Hanson* (2005)</u>

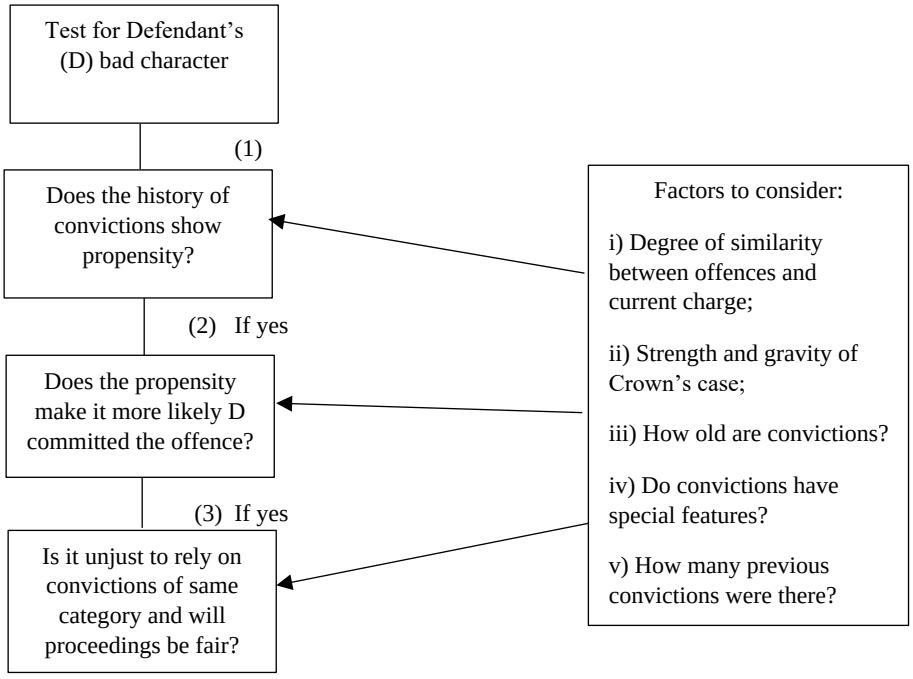

Table 7 - Test for admissibility under section 101(1)(d).

[291] *R v Hanson* [2005] EWCA Crim 824.
[292] *Criminal Justice Act 2003*, 'Explanatory Notes', 358.
[293] [2005] EWCA Crim 824.

In addition to these questions, *Hanson* also interpreted the legislation to be that propensity is not confined to offences of the same description or category and that there is no minimum number of convictions required to show propensity. Furthermore, judicial discretion to exclude should be kept in mind including the degree of similarity between the convictions and the offence charged, the respective gravity of the offences and the strength of the prosecution's case and that old convictions are likely to have an adverse effect on the fairness of the proceedings. In regard to warnings, each individual conviction must be considered and the importance of correctly directing the jury should be stressed where bad character evidence is admitted and instructed not to place undue reliance on the bad character evidence.[294]

While laying down these guidelines, the Court of Appeal also moved to narrow gateway (d) by limiting the type of convictions that could pass through it:[295]

> As to propensity to untruthfulness, this, as it seems to us, is not the same as propensity to dishonesty. Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful,…where [as in this case] truthfulness is an issue.[296]

With *Hanson* being the first interpretation of the new propensity legislation of the CJA, the courts now had a precedent to follow with any new rulings. This was made clear in *Hanson* where Rose LJ affirmed the test that:

> If a judge has directed himself or herself correctly, this Court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of non-compliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's view as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably…

As the following cases will demonstrate, any successful appeals have been based on this test in that the decision, by the trial judge, was either plainly wrong or the discretion was exercised unreasonably.

[294] *Hanson* (n 291).
[295] Redmayne (n 252) 198 [9.2].
[296] *Hanson* (n 291) [13].

One case in which the application was wrong is; *R v Murphy*,[297] where the trial judge had applied Rose LJ's guidelines from *Hanson* and allowed the defendant's prior convictions. However, the Court of Appeal did not consider that a single previous conviction for the possession of a shotgun 20 years previously, amounted to acceptable propensity evidence towards the current charge of possession of a firearm and criminal damage. In their judgement, the Court of Appeal formed the view that in this case, the trial judge was wrong in admitting the defendants' previous conviction and stated that:

> Had the [prior] conviction (for possession of a shot gun) been more recent… then the judge's ruling would have been more understandable… But we find it impossible to accept that one isolated instance of possession… is capable of establishing a propensity on his part…[and] it was simply too slender a basis upon which such a propensity could be founded.[298]

The appeal, in this case, was successful and demonstrates that when the courts interpret the guidelines in *Hanson*, they should do so on a case-by-case basis.

The case of *R v Tangang*[299] in 2007 was another case where the defence appealed against the trial judge for allowing two charges of fraud, which occurred separately, in one trial. In this case, the introduction of the defendant's prior conviction was based on the evidence that the similarity between the two alleged offences made them capable of being evidence of propensity and the fact that they occurred only two weeks apart. In their judgement, the Court of Appeal used the test by Rose LJ in *Hanson* and stated that the trial judge's decision 'was not plainly wrong, nor is there any grounds for saying his discretion [had] been exercised unreasonably'.[300]

An important guideline from *Hanson* was regarding the use of previous convictions, there were other guidelines which were brought before the courts in other cases. In the case of *R v Ellis*[301] in 2010, the concern was not the introduction of the defendants' prior convictions, but how the trial judge instructed the jury to use these convictions. *Ellis* was charged with having an offensive weapon in a public place and evidence of six prior convictions for forgery, theft and telling lies to police were adduced to show the defendants bad character and

[297] [2006] EWCA Crim 3408.
[298] *Murphy* (n 297) [17]
[299] [2007] EWCA Crim 469.
[300] Ibid [17].
[301] *Ellis* (n 120).

propensity to be untruthful. The Court of Appeal dismissed the application, but believed that the trial judge should have gone further in directing the jury by stating:

> In our judgement… it seems to us that the judge did indeed fail to warn the jury that they should not conclude that the defendant has been untruthful… merely because he had been untruthful earlier. The judge did [tell] the jury that it 'was up to them' to take into account the previous dishonesty of the defendant, namely that he was untruthful. The judge was right… in that way, but in our judgement he should have gone… further and given the warning to the jury and directed them that they 'should not necessarily infer from the fact that he had previously been untruthful that he must therefore have been untruthful on the instant occasion'. We accept… that there was an omission in the judges' summing-up which is…. significant.[302]

This decision by the Court of Appeal gave more clarity to the guidelines in *Hanson* in that a judge needs to be clear when warning the jury about previous convictions.

In 2011, the Court of Appeal was faced with another case where the appeal was based on the introduction of the defendant's bad character and that the trial judge's summary was unfair and deficient.[303] In *R v McDonald*,[304] the defendant was charged with five counts consisting of attempted murder, possession of a firearm and possession of ammunition. The defence submitted that the reasoning behind the introduction of the prior convictions by the prosecution was to 'bolster a weak case'.[305] However, the prior convictions consisted of bad character evidence relating to previous use of firearms, possession of firearms in 1990 as well as robbery, wounding with intent and possessing a firearm in 2007. From this, the Court of Appeal dismissed the application by the defence and agreed with the trial judge that it was 'a strong case'[306] and though 'the effect of the bad character evidence was devastating…we accept the bad character evidence powerfully supported the prosecution's case…[because] it was relevant'.[307] This again demonstrates that even though the defendant's prior convictions were from years prior, the relevance and respective gravity of the propensity evidence as discussed from the guidelines in *Hanson*, was still taken into consideration by the courts.

A more recent case; *R v Ballo*[308] where the defendant's prior convictions were two linked incidents of wounding with intent to do grievous bodily harm and possession of a firearm

[302] Ibid 11.
[303] *R v McDonald* [2011] EWCA Crim 2933 [7].
[304] [2011] EWCA Crim 2933.
[305] *McDonald* (n 303) [8].
[306] Ibid [12].
[307] Ibid [15]
[308] [2020] EWCA Crim 1648.

with intent to danger life. Still, these prior convictions were nine and a half years before the current alleged charge. As was seen previously in *R v Murphy*[309], the Court of Appeal decided that one single previous conviction 20 years prior, though similar in nature, was not enough to amount to propensity. However, in this case, the Court of Appeal agreed with the trial judge that 'the prior convictions were capable of establishing a propensity despite their age,[310] particularly given that the present firearm offence charge was exactly the same as that committed by the defendant 10 years previously'.[311] They reinforced the trial judge's ruling by describing it as 'impeccable'.[312]

Interpretation of the guidelines in *Hanson* and the propensity rules of the CJA remain at the court's discretion. Though the founding decision is applied under the doctrine of precedent, the courts have provided clarity over the years. An example of this can be found in the case of *Freeman and Crawford*,[313] where Latham CJ stated that:

> The bad character provisions of the 2003 Act had not confined relevance of previous bad conduct to that which established a propensity to commit offences of a similar kind [and that] evidence may be relevant to issues between the prosecution and the defence whether or not it is relied upon to establish propensity.[314]

Latham CJ further clarified that:

> In some of the judgements since *Hanson*, the impression may have been given that the jury, in its decision-making process in cross-admissibility cases should first determine whether is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the evidence in relation to that count in dealing with any other count in the indictment… We consider that this is too restrictive an approach. Whilst the jury must be reminded that is has to reach a verdict on each count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way…described.[315]

The guidelines which came from *Hanson* have continued to not only be applied as they were written but have also kept in line with the legislator's intentions as to the interpretation

[309] [2006] EWCA Crim 3408.
[310] *Ballo* (n 308) [22].
[311] Ibid [23].
[312] Ibid.
[313] [2008] EWCA Crim 1863.
[314] Ibid [20]
[315] Ibid.

of section 101(1)(d) in the CJA. Though the admission of non-defendant bad character in section 100 of the CJA is not discussion in this thesis, it can be noted that it was suggested that *Hanson* should be the standard for both section 100 and 101 by the Court of Appeal.[316]

J *Analysis Of Interpretation Of The Gateways*

Arguably, the seven gateways of section 101(1), have made the admission of bad character evidence possible in many cases where it was once not possible. This is reflective of the Government's intention to make it 'clear that relevant evidence is admissible'.[317] For example, the third gateway provides that bad character evidence is admissible if it is important explanatory evidence.[318] Under the common law it would have been inadmissible to adduce evidence of prior convictions by the defendant, to explain the victim's response to the charged offence, however under this gateway, prior convictions become important explanatory evidence and are thus admissible.[319]

Within the law of evidence, there is a broad definition of character that refers to any behavioural tendency or propensity.[320] In English law, after the introduction of the CJA, the latter term has become the current form, which uses propensity as a key concept. The propensity view of character has the virtue of being simple: if A is more likely than other people to do X, he or she has a propensity to do so, however, there is the concern that this may be too simple with one concern being that the propensity view may be blind to motivational aspects of behaviour.

There is the bias that admitting evidence that indicates the bad character of a defendant within a trial is inherently dangerous as it carries with it the risk of convicting the innocent and this assumption was why there was some opposition to the new provisions when the Criminal Justice Bill was in Parliament. While the clear intention was to substitute the new provision on the admissibility of bad character evidence for the old, it was considered a 'curious way' of doing it as the target was obviously the old rules of *inadmissibility* of bad character evidence.[321]

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[316] Matt Thomason, 'Non-defendant bad character and s.100 of the Criminal Justice Act 2003: A socio-legal analysis of admissibility gateways and trial tactics' (2023) 27(1) *The International Journal of Evidence & Proof* 26, 19.
[317] M Stockdale, E.J Smith, & M.S. Rogue, *Bad Character Evidence in the Criminal Trial: the English Statutory/Common Law Dichotomy--Anglo-Australian Perspectives* (2016) (online) 445.
[318] *Criminal Justice Act 2003* section 101(1)(c).
[319] *R v M* [2006] EWCA Crim 193.
[320] B J Anderson, 'Recognising Character: A New Perspective on Character Evidence' (2012) 121 *Yale LJ* 1912.
[321] The distinction between rules of admissibility and of inadmissibility is recognised elsewhere in the Act: see s 62(9), was emphasised in *R v Y* [2008] EWCA Crim 10, [2008] 2 All ER 484, [47, and further endorsed in *R v O* [2008] EWCA Crim 463, [29] as cited in Munday, (n 219) 383.

However, it is clear that the most substantial rule of the old law relating to bad character evidence, namely that it was admissible if relevant and not excluded by a rule of inadmissibility, has in fact been retained.[322]

It was widely predicted that the new provisions would result in an increase of convictions and was the reason why the legislation was promoted and opposed. It was assumed, on one hand, those convicted would be guilty, and on the other, there was the belief that innocent people would be convicted. Judges and practitioners have stated that the most practical impact of the Criminal Justice Act reforms is not an increase in the conviction-rate, but a change in the way that trials are conducted, and, a change of culture in the cross-examination of witnesses.[323] Contrary to the fears expressed in Parliament when the legislation was being enacted, judges, magistrates, prosecutors, and defence lawyers all seemed to think that fact-finders in the criminal courts usually treat the defendant's bad character as of secondary importance, and the impact of the change was relatively small, which led to the general conclusion that 'the new rules have not adversely impacted on the balance between the prosecution and the defence'.[324] Though there have not been any changes to the legislation in the last 18 years, the real test, as will be discussed in the next chapter, was whether the intended purpose of the new Act, of fixing the rate of crime, had succeeded and whether a reduction of the rates of recidivism had occurred.

K *Conclusion*

This Chapter has sought to explain the background and reasons why England has adopted a radical and comprehensive approach to bad character and propensity evidence. Commencing in 1972, a series of reports were produced which culminated in the Criminal Justice Bill, introduced in 2002. A driving force behind the legislation was public concern that prior criminal records of defendants for similar offences were being unreasonably withheld from the jury. In other words, the 'shield' was too high and led to unsatisfactory verdicts, or outcomes, as seen in the case of Sarah Payne.

The case of Sarah Payne previously discussed in section B, demonstrates how the CJA provisions in sections 103(1) to (4) would have allowed the jury to hear of Whiting's past criminal history, preventing the outrage which came after the trial. These provisions were written to narrow down the opening of the gateways to specific crimes, such as theft and child

[322] See *R v Highton* [2005] EWCA Crim 1985.
[323] Spencer (n 244).
[324] Spencer (n 244).

sexual assault, and as mentioned in Chapter III, have only recently been similarly implemented in the *Evidence Act 1995* (NSW) under section 97A.

The resulting legislation in England sought to reconcile the conflicting principles in *Makin* such that bad character and propensity evidence was prima facie admissible, under seven gateways, subject to the prosecution meeting certain criteria, which were designed to achieve a fair balance by leaving considerable discretion to the courts to ensure a fair trial.

In *R v Hanson*[325], discussed in this Chapter under section I, was the earliest case that interpreted the new CJA provisions by providing guidance on how to admit bad character and propensity evidence, specifically under section 101(1)(d). *Hanson* also interpreted areas of the new legislation concerning previous convictions, judicial discretion, and warnings to the jury and also narrowed the type of convictions allowed to pass through the gateways.

The guidelines established in *Hanson* have continued to be applied in subsequent cases,[326] and are in line with the intention of the legislators as to how the legislation would be interpreted by the courts given the guidelines and the propensity rules of the CJA remain at the court's discretion.

The CJA radically abolished the old common law rules under section 99 in favour of legislation which potentially allows evidence relating to a defendant's bad character to be admitted, as depicted in Table 6.

Along with these gateways, the CJA differed from the common law by combining bad character and propensity evidence under one piece of legislation instead of a separate treatment as currently occurs in Australia. Thus, the admission of bad character and propensity evidence has become easier for the prosecution, subject to the discretion of the courts charged with overseeing a fair trial.

This Chapter has focused on section 101(1)(d) as this is the gateway in which bad character and propensity evidence has been combined because, as previously stated in Chapters II and III, this is where Australia arguably lacks cohesion.

Chapter V will extend the discussions undertaken in Chapter IV to include the impact of the new legislation on recidivism and the potential for greater jury prejudice towards the defendant in England and Wales. In particular, whether under the CJA the greater ability to adduce bad character and propensity evidence has impacted the number of convictions, either in the form of a greater number of guilty pleas or a higher proportion of guilty verdicts. Such

[325] *Hanson* (n 291).
[326] See *R v Murphy* [2006] EWCA Crim 3408; *R v Tangang* [2007] EWCA Crim 469; *R v Ellis* [2010] EWCA Crim 163; *R v McDonald* [2011] EWCA Crim 2933 and *R v Ballo* [2020] EWCA Crim 1648.

an outcome is desirable provided it has been achieved without compromising the right of a defendant to a fair trial and without opening up the potential for greater jury prejudice. England has sought to minimise the potential for evidence of bad character and propensity to be used in a prejudicial manner by the jury through judicial discretion, guidelines and the need for the evidence to have substantial probative value.

CHAPTER V – JURY PREJUDICE AND IMPACT OF RECIDIVISM

"It is bad enough that so many people believe things without any evidence. What is worse, is that some people have no conception of evidence and regard facts as just someone else's opinion". – Thomas Sowell

A *Overview*

While Chapter IV discussed the history and development of the CJA in England, Chapter V examines whether the CJA potentially created a higher risk of jury prejudice towards the defendant and what impact, if any, the CJA had on the levels of recidivism. Consideration of this must be taken into account as the intention of the CJA amendments was to minimise the danger of increasing jury prejudice towards the defendant and thereby potentially undermining the ability of a defendant to receive a fair trial. This of course was a major criticism of the legislation by its opponents.

The CJA's effect on a jury hearing bad character evidence was characterised by Lord Phillips CJ in *R v Campbell*[327] when he stated, 'prior to the *Criminal Justice Act 2003,* it was rare for a jury to be given details of a defendant's previous criminal record. Since [the CJA] has come into force, it has become much more common'.[328]

This Chapter will also consider if the new bad character and propensity evidence rules had any impact on the administration of justice and the operation of the courts in the way of more guilty pleas or a larger number of guilty verdicts by examining court statistics covering the introduction of the CJA in 2008 until 2022.[329]

[327] [2007] EWCA Crim 1472.
[328] Ibid [1].
[329] Note statistics between the years 2020 and 2022 have been influenced by the recent COVID19 pandemic.

B *Should Juries Hear Evidence Of Prior Convictions?*

"It is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence"
– William James

The CJA's intentions were to rebalance the system 'in favour of the victims'[330] while simultaneously maintaining the fair treatment of defendants.[331] However, this change in policy triggered responses ranging from 'a change for the better'[332] to liberal condemnation of the CJA as part of a 'government drive to progressively demolish justice and all its institutions'.[333]

At issue was if the CJA had gone too far in its quest to redress the balance, inadvertently exposing defendants to a disproportionately higher risk of convictions.[334] The key concern surrounding the opposition to allowing prior convictions to be adduced is that the jury will inappropriately use the evidence. Opponents of the CJA have argued that such evidence has a disproportionately prejudicial effect on the jury and in turn, would convict the defendant without considering the weight of other factual evidence in detail.[335] However, to exclude evidence from a trial on the basis that it's likely to make the jury more willing to convict, would undermine the entire function and purpose of the trial process.[336] If this was the case, the prosecution would not be permitted to call any evidence at all.[337] Spencer points out that the question should be whether the power of such evidence to persuade the court is proportionate to its relevance to the case, [338] and why the CJA provides underlying provisions for this to occur (on a case-by-case basis) by making allowances for such evidence to be admitted.[339]

Former British Home Secretary, David Blunkett who introduced the CJA legislation into Parliament, stated in an interview that the new provisions in the CJA would only allow a defendant's prior conviction evidence to be admissible if it is relevant to "an important matter

[330] Mr David Blunkett (Home Secretary) 'Criminal Justice White Paper', Hansard, (Commons Sitting, HC Deb July 2002) vol 389 cc 287-304 [287].
[331] Ibid [290] (Mr Oliver Letwin).
[332] Spencer (n 244) 34, [1.91].
[333] B Hudson, *'Balancing Rights and Risks: Dilemmas of Justice and Differences'* in N Gray, J Laing and L Noaks (eds) Criminal Justice and the Politics of Risk (2003) Cavendish Publishing Ltd London, 99.
[334] Rachael Tandy, 'The Admissibility of a Defendant's Previous Criminal Record: A Critical Analysis of the Criminal Justice Act 2003' (2009) *Statute Law Review* 30(3), 203.
[335] Ibid 213.
[336] Ibid.
[337] Ibid.
[338] Ibid.
[339] Ibid.

in issue".[340] This includes whether the defendant "has a propensity to commit offences of the kind with which he is charged".[341] This rule allows some boundaries which were intended to help ensure fairness despite the potentially prejudicial evidence being admitted. In taking a balanced view, Professor Michael Redmayne from the London School of Economics, stated the concern was that:

> previous convictions are prejudicial, and juries could give too much weight or take a dislike to the defendant [however] if juries aren't told of prior convictions, they are likely to speculate about it [and so] in some ways it may be beneficial for the defendant for the jury to know.[342]

Certain offences are presented to juries more frequently than others.[343] In 2010, the Ministry of Justice published research underlining this. Theft offences made up the single largest proportion of the 537,726 charges (25%) in the Crown Courts between 2006 - 2008. However, the single largest proportion of the 66,889 jury verdicts is for sexual offences (31%).[344] This research showed that jury conviction rates appear to be highest where strong physical evidence is most likely to be presented against the defendant including offences such as theft, drugs, falsification, and deception.[345] The research also showed that offences with the lowest conviction rates are the ones where the jury has to choose between conflicting versions of events, often in the absence of strong corroborating evidence.[346] The Ministry of Justice's key findings in this research were that juries appear to try cases on the evidence and the law and where strong direct evidence exists against the defendant.[347]

Whereas the old law permitted the use of bad character evidence to deduce a propensity to commit an offence only if the tightly drawn 'similar fact' exception was satisfied, the reformed law is much less circumscribed.[348] The Court of Appeal has stated that juries should be warned about 'placing undue reliance on previous convictions'[349] and given bad character

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[340] Joshua Rozenberg, 'Juries will be told of previous convictions', *The Telegraph* (online, 26 October 2004) http://www.telegraph.co.uk/news/uknews/1475077/Juries-will-be-told-of-previous-convictions.html.
[341] Ibid.
[342] Interview with Professor Michael Redmayne (Lindy Kerin, Radio Interview, 16 March 2003) http://www.abc.net.au/am/content/2013/s3717102.htm.
[343] Cheryl Thomas, '*Are juries' fair*?' Ministry of Justice Research Series 1/10 (Ministry of Justice, February 2010) 28.
[344] Ibid.
[345] Ibid 29.
[346] Ibid.
[347] Ibid 31.
[348] Mark Coen, 'Hearsay, bad character and trust in the jury: Irish and English contrasts' (2013) 17 (E&P) *The International Journal of Evidence and Proof* 250-271, 263.
[349] *R v Hanson* [2005] 2 Cr App R 299 at 306 as cited in Coen (n 332).

directions tailored to the facts of individual cases[350] but has also emphasised the evidence should be entrusted to the common sense of jurors.[351]

The 2021 Crown Court Compendium[352] Chapter 12 sets out directions which should be given to a jury in the event of the admission of bad character evidence. This is to reinforce the intention behind the legislation and the Court's interpretation to ensure a fair trial. This document is the equivalent of the Australian Bench Book.

C *Directions And Guidelines Recommended For The Jury*

"Injustice everywhere is a threat to justice everywhere" – Martin Luther King Jr.

The Crown Court Compendium is a document which provides judges with general and gateway-specific guidelines on how to direct the jury during a trial.

The general jury directions (see Appendix D) focus on balancing fairness between the prosecution and the defence. This is reflected in the language used which includes for example that the jury must be reminded that there will be evidence from 'both sides' and directed 'carefully' where evidence of propensity is in dispute.[353] The jury must also be directed that the 'evidential presumption' must 'truthfully reflect' that the offence was committed by the defendant.[354] Directions to the jury also included that the evidence has 'limited purpose(s)' on how it 'may' or 'may not' be used[355] and that the jury must decide if the evidence establishes, 'if at all', what is intended by the party relying on it.[356] These directions show the intention of maintaining a fair balance between the prosecution and defence by minimising the risk of jury prejudice which was the intention of the CJA amendments.

Directions specific to section 101(1)(d) (see Appendix E) focus on areas such as whether the evidence is admitted *or* (original emphasis) in dispute, and if in dispute, appropriate directions on the burden and standard of proof are given. Rules on the burden and standard of proof are discussed later in this section. The specific directions contained in section 101(1)(d) also focus on 'explanations' and 'differences' explained by the defence and identify

[350] *R v Campbell* [2007] EWCA Crim 1472 (Lord Phillips CJ).
[351] Ibid [27].
[352] United Kingdom, 'Crown Court Compendium Part 1' (Judicial Collage, August 2021).
[353] Ibid (General Directions) [1].
[354] Ibid [2].
[355] Ibid [4].
[356] Ibid [5].

which evidence ‘is’ and ‘is not’ relevant. For example, propensity as well as ‘fact specific’ directions to ‘help’ them decide which issues are relevant. These directions also state that if the evidence is ‘exclusively’ within the limitations of section 101(1)(d), the jury should be ‘warned against prejudice’ towards the defendant or ‘over reliance’ on evidence which shows bad character and not to convict ‘wholly or mainly’ on the defendant’s prior convictions or past behaviour. These specific directions must also be read with the general directions mentioned above.

By providing jury directions specific to each ‘gateway’, the Crown Court Compendium comprehensively considers both the prosecution and the defence with the intention of not only ensuring evidence is handled properly but also balances evidence which is admitted through the CJA.

The amendments made to the CJA were policy-based and were made partially from public concern that a defendant was overly protected by a ‘shield’, preventing the jury from hearing evidence of relevant prior offences. Similar public concern has been the basis for micro-level amendments introduced in Australia regarding sexual offences, particularly against children, which have subsequently evened the playing field between the prosecution and the defence. In Australia, it is now easier for victims of sexual assault to give evidence against their alleged attacker by way of video recordings, section 93A statements (in Queensland) and restrictions on cross-examination.

By contrast with the approach in Australia, England has adopted a unified approach based on a policy view that the playing field in a criminal trial, as regarding prior convictions, was unfairly tilted towards the defendant. The CJA amendments were designed to construct a ‘*level*’ playing field rather than as critics maintained, a ‘*tilted*’ playing field in favour of the prosecution. Australia has sought to engineer the same outcome for sexual offences against children, especially in New South Wales and the Northern Territory (with section 97A of the Uniform Evidence Acts) following the Royal Commission, without adopting a more macro approach to both propensity evidence and prior convictions.

D *Burden And Standard Of Proof*

The general and section 101(1)(d) specific guidelines extracted above both refer to the burden and standard of proof, and these are also considered in the Crown Court Compendium (see Appendix F). The purpose of these directions was to reinforce the specific directions for each gateway by seeking to ensure that the criminal standard of proof of beyond reasonable doubt was not lowered by virtue of the jury learning about the defendant's prior convictions.

The directions on the burden and standard of proof in the Crown Court Compendium are referenced in the jury directions for section 101(1)(d). These directions also ensure that the jury understands that the 'prosecution bears the burden of proving…the defendant is guilty' and that 'clear instructions' must be given to the jury that they must be 'satisfied' and 'sure' before convicting. Burden and standard of proof have also been linked to the language 'beyond reasonable doubt'. If this language has been used, though 'unwise to elaborate' on what is the standard of proof, the jury 'should be told' that this 'means the same thing as being sure'. This combination of the jury directions and burden of proof directions specified in the Crown Court Compendium work in tandem to again reinforce the objective of providing a fair trial.

Tandy makes the point that previous convictions can help indicate the propensity of a defendant to commit particular offences which, in turn, could influence the outcome of a trial.[357] However, Tandy also argues that it would be 'extremely rare' for character evidence to make that much of an impact on a jury, commenting that the 'evidence is [either] not necessary',[358] as guilt has potentially already been established or, that the evidence would be 'unlikely to persuade'[359] them in the event that they are 'unsure' of the evidence.

Essentially, Tandy is having an each-way bet on the competence of the jury. On the one hand, she appears to be arguing that there is little purpose in allowing evidence of prior convictions before a jury because it would have little impact, while on the other hand, suggesting that 'character evidence could be so significant that it is capable of making a juror almost certain of guilt when he was not before'.[360] Either the jury can make up its mind without prejudice or be shielded entirely. The policy of the CJA amendments is the former.

The discovery of prior convictions could have some effect on how a defendant is perceived by a jury. However, as previously stated in Chapter IV, the use of bad character evidence and prior convictions admitted through the CJA is not done without its own checks

[357] Tandy (n 334) 215.
[358] *R v Britzman* [1983] 1 All ER 369.
[359] Tandy (n 334).
[360] Ibid.

and balances. The CJA was amended specifically for the purposes of not 'unduly prejudicing the fairness of [a] trial" with the belief that "trials should be a search for the truth and juries should be trusted with all the relevant evidence available to help them to reach [a] proper and fair decisions".[361]

E *Background On The Impact Of The New Legislation On Juror Deliberation*

There have been many discussions on whether the new provisions relating to adducing evidence of bad character and/or prior convictions in the CJA would affect jury verdicts. It was mentioned that the 'traditional' argument for not allowing bad character or prior conviction evidence was that if the court was informed of these indiscretions, the chance of a conviction is 'significantly higher'.[362] However, the recommendation in the White Paper was that 'juries should be trusted' and these new rules were 'rewritten to ensure…a just verdict'.[363] The question is, has this happened?

Chapter IV noted that opinions on the influence sections 98, 99 and 101 would have on jurors varied in degrees of negative impact on the defendant in the immediate period after the implementation of the CJA. In 2004, Home Secretary David Blunkett said the measure would allow juries to have greater access to information on previous convictions and other misconduct "without unduly prejudicing the fairness of the trial". He continued that "trials should be a search for the truth and juries should be trusted with all the relevant evidence available to help them to reach proper and fair decisions".[364] Looking from the opposite perspective, Barry Hugill for the Human Rights group Liberty, said "With the best will in the world, most jurors would find it very difficult not to be influenced by the admission of previous convictions".[365] Rod Dalley, the vice-chairman of the Police Federation of England and Wales, said "On too many occasions my colleagues have watched the devastation and anger on the faces of victims and the astonishment of juries, as a whole catalogue of relevant previous convictions are read out at the end of a trial as the defendant walks free".[366] This was the central goal of the White Paper, and in turn the CJA, to rebalance the criminal justice system by allowing the court to hear of previous convictions where appropriate.[367]

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[361] Clare Dyer, 'Juries may be told of previous convictions', The Guardian Newspaper (25 October 2004).
[362] Spencer (n 244) 10 [1.26].
[363] Justice For All (n 223) 79 [4.53].
[364] Dyer (n 361).
[365] Ibid.
[366] Ibid.
[367] Justice for All (n 223) 12.

F *Psychological Studies*

"The trouble is that once people develop an implicit theory, the confirmation bias kicks in and they stop seeing evidence that doesn't fit it" – Carol Tavris

Given the mix of negativity and sympathy or concern engendered by prior conviction evidence, a simple association between the introduction of prior conviction evidence and subsequent confidence in guilt cannot always be assumed. Although other studies[368] have shown that prior conviction evidence makes a guilty verdict more likely, this may reflect the validity of these experiments and that juror interpretation of the significance of prior conviction evidence was likely tied to the conclusions drawn from other evidence.[369]

There are several different areas that psychologists look at when conducting studies on jury prejudice. These include cognitive psychology, social psychology, and individual differences. This is used to unlock the processes behind the decisions jurors reach.[370]

Studies on the impact of admitting evidence of prior convictions have on mock juries have been conducted over the years. The purpose of a study conducted by Honess and Mathews[371] was to examine jurors after the admittance of prior conviction evidence and to question the association between the inclusion of this evidence and the jury's verdict of guilty. The study also examined whether mock juries consider any 'fairness' towards defendants who have prior convictions. Results concluded that there was no simple association between admitting prior conviction evidence and the judgement.[372] However, there were indications that during jury deliberations, careful consideration of the evidence was conducted[373], thus showing that the verdict had not been based solely on the defendant's prior convictions. A study[374] by Australian Jane Goodman-Delahunty and Natalie Martschuk on the impact of prior negative behaviours (prior sexual misconduct) on mock juries showed indications that the risk of unfair

[368] Bornstein, 1999: Vidmar, 2008.
[369] T. M. Honess and G. A. Mathews, 'Admitting evidence of a defendant's previous conviction (PCE) and its impact on juror deliberation in relation to both juror-processing style and juror concerns over the fairness on introducing PCE' (2012) Legal and Criminological Psychology, The British Psychological Society, 17, 360-379, 377.
[370] Dr Hiel Dror, Dr Lee John Curley and Dr James Munro, 'Opinion: Juries are subject to all kinds of biases when it comes to deciding on a trial (2022) UCL (online).
[371] Honess and Mathews (n 369).
[372] Ibid 360.
[373] Ibid.
[374] J Goodman-Delahunty and N Martschuk (2020) Mock jury and juror responses to uncharged acts of sexual misconduct: Advances in the assessment of unfair prejudice, *Zeitschrift fur Psychologie*, 228(3), 199 – 209. http://doi.org/10.1027/2151-2604/a000410.

prejudice from the evidence of prior misconduct, was overstated and erroneous. This study will be mentioned again in the comparison between England and Australia in Chapter VI.

G *Summary*

During the drafting of the CJA, protection against jury prejudice when evidence of bad character is being adduced was included in the sections 101(1)(a) and 101(3). Section 101(1)(a) clearly states that evidence must be agreed upon by both parties[375] and in the second instance, instructions regarding evidence being adduced to the jury, section 101(3) of the CJA states that, in regards to admitting evidence under gateway (d) (and (g)), that the court must not admit evidence if, on application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In addition to this, the Crown Court Compendium provides directions, general and gateway-specific directions, designed to help direct the jury when character evidence is being adduced and mock jury studies have found that the use of previous convictions shows 'no…association between admitting prior conviction evidence and the judgement' as well as showing indications that juries 'carefully consider' the evidence.[376]

While to some commentators the provisions of the CJA do appear to 'favour' the prosecution it is unclear whether this is because of 'hopelessly vague terms'[377] in which the CJA is drafted[378] or if it was done as an 'intentional lean towards policy considerations' designed to level the playing field between the prosecution and defence. The idea that the CJA 'favours' the prosecution can only be assumed by the total removal of the defendant's shield. Consideration was provided in the analysis of the reasons for the introduction of the CJA, as discussed in Chapter IV, where the new provisions of the CJA provide specific details on what is allowed to be admitted under the new bad character definition and that the evidence must also pass through one of seven gateways. In addition, there is the 'fairness' clause under section 101(3), where evidence cannot be admitted if it would 'unfairly prejudice the defendant'. It is apparent that the CJA has attempted to cover all areas of concern regarding 'favouring' the prosecution. The statement of the belief that the CJA is based on 'hopelessly vague terms' is

[375] This section is not under discussion for this thesis and therefore further explanation on this section will not be discussed in detail.
[376] Honess and Mathews (n 369).
[377] A Roberts 'commentary of *R v Timaveanu'*, quoted in B Fitzpatrick 'Criminal Justice Act 2003: Meaning of Bad Character' (2008) *J Crim L* 72, 106 as cited in Tandy (n 318) 216.
[378] Tandy (n 334).

unsubstantiated.[379] Nevertheless, Tandy concedes that the judiciary's interpretation demonstrates a safe, measured approach which seems, at present, unlikely to present a significant threat to the rights and liberties of criminal defendants.[380]

Despite previous comments, Tandy provides support for the conclusion that the implementation by the courts on the legislation paints a more encouraging picture with the bulk of the case law appearing to advocate common sense as a central strand of reasoning[381] and the potential for jury prejudice has been greatly reduced. This summary will be further developed in Chapters VI and Chapter VII.

H *Recidivism In England*

"Do the best you can until you know better. Then when you know better, do better" – Maya Angelou

The CJA amended the bad character and propensity evidence rules with the intention of tilting the scales towards a more even-handed justice system. One potential outcome in introducing the new evidential rules was that should more evidence of prior convictions be allowed in, the number of guilty verdicts would increase. The previous section discussed whether the CJA amendments created greater jury prejudice with the conclusion being that with the combination of general jury directions along with gateway-specific directions, psychological mock jury studies performed and interpretation of the amendments by the courts, the potential for a jury to become more prejudiced appears to have little foundation. To help expand on this, it is important to firstly look at what the CJA achieved for the recidivism rates in England and secondly whether there was an increase in the percentage of guilty pleas.

Statistical information on the recidivism rates between 2008 and 2022, with some reflections back to 2001, will be examined to show any fluctuations in the recidivism rates. However, due to the Covid 19 pandemic, statistical information has been affected which should be taken into consideration.

Recidivism is defined as the relapse of criminal behaviour that results in the rearrest, reconviction, and reimprisonment of an individual.[382] There are several factors that have been known to affect acts of recidivism including the person's circumstances before incarceration,

[379] Tandy (n 334) 216.
[380] Ibid.
[381] Example cases include *Hanson*, *Edwards*, *Campbell*, and *Wallace* whom all take this approach.
[382] Recidivism Rates by Country, World Population Review (2021) www.worldpopulationreview.com.

their social environment and community support, events that occurred during their incarceration, and the difficulties faced with adjusting back into everyday life.[383] The predominant question surrounding recidivism is whether:

> after a given period of time, is the risk of recidivism for a person who has been arrested in the distant past ever indistinguishable from that of a population of persons with no prior arrests or are the empirical facts that firstly, individuals who have offended in the past are relatively more likely to offend in the future, and secondly, the risk of recidivism declines as the time since the last criminal act increases, too strong.[384]

The table below shows that in 2008/09, the recidivism rate for all offenders in England was sitting at 31.6%. Over the following 11 years, the recidivism rate indicates a downward trend to 25.6% in 2020/21, a decrease of 19%.

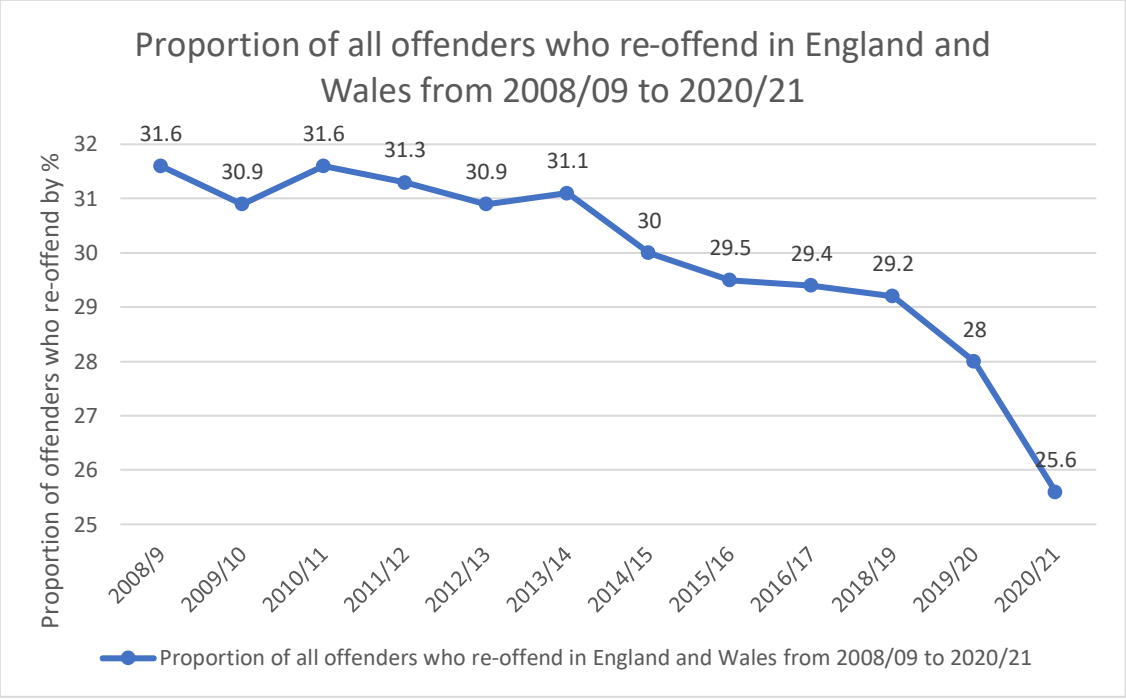

Table 8 - Copied from D. Clark, published Feb 18, 2022, on Statista.com.

[383] Ibid.
[384] Megan C Kurleychek, Robert Brame and Shawn D Bushway, 'Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending' (2006) 5(3) *Criminology and Public Policy* 483, 483.

It is difficult to isolate the individual factors that contribute to the decline in the proportion of offenders who re-offend. This is because numerous reforms to the criminal justice system have been implemented as part of the overall package identified in the 'White Paper' as mentioned in Chapter IV. However, to the extent that the changes made in 2003 under the CJA to make it easier for the Crown to adduce bad character and propensity evidence, may account in part for the downward trend in recidivism between 2008 and 2021.

The statistics for adult offenders in 2020 showed a proven re-offending rate of 28.8% which was an increase of 3% since the same quarter in 2019. However, the volume of offenders associated with this latest cohort has decreased sharply due to the impact of the COVID-19 pandemic, with the overall size of the cohort decreasing by 56.3% since the same quarter in 2019. This has resulted in figures being considerably more volatile across a number of subgroups.

A study conducted by Mike Redmayne[385] on the effects of prior convictions and recidivism compared the conviction rates of adults who were released over a period of one year. Results from Redmayne's statistical study show some similarities with current statistics by the Ministry of Justice. These similarities include results that show that the offence of theft, or as called by Redmayne, burglary, had the highest recidivism rate. Specific results from Redmayne's study showed that an offender who had been previously convicted of theft was '773 times more likely to be convicted of further thefts', and that a person who was previously convicted of a sexual offence was 'over 2,353 times more likely…to be convicted of further sexual offence[s]'.[386] Redmayne concludes that the statistical results 'give some idea about the differences between those with previous convictions and those without, but cannot be taken as anything like exact… [however, even] if a person with previous convictions is only twice as likely to offend [than] someone without, [it] is still significant in terms of [its] probative value'.[387]

In an attempt to explain the meaning of the figures disclosed by Redmayne's study, Liat Levanon published a research article[388] commenting on the recidivism rates and determining two broad meanings to these results. Firstly, that they were 'purely evidential' which indicates that a past [offender] is 'statistically more likely than a random person to have committed [the crime] in issue' and secondly, that these statistics have a 'metaphysical meaning' which

[385] Redmayne (n 252).
[386] Ibid 24.
[387] Ibid 25.
[388] L. Levanon, 'Bad character, tragic errors and deep ignorance' (2019) Legal Studies, The Society of Legal Scholars.

indicate that 'the choice to refrain from crime is more challenging and difficult for [offenders] than for others who [have] not previously committed crime[s]'.[389]

Statistical research from Redmayne's study through to the latest results uncovered by the Ministry of Justice has shown a decline in the recidivism rate. It is apparent that offences which relate to theft are still an issue in today's society. The conclusion that the decision by the English Government to include the offence of theft, as discussed in Chapter IV, as acceptable to be introduced as propensity evidence, is not surprising.

The discussion on section 103(4)(b) points out that propensity evidence may be established by evidence that [the defendant] has been convicted of 'an offence of the "same category" as the one charged' and section 103(4)(b) defines 'same category' as being two offence categories prescribed by the Secretary of State. These two categories are firstly property offences which include theft, robbery, burglary and such like and secondly, offences which cover underage sex offences.[390] The decision by the Government to include these two categories as a means to use propensity evidence could be linked to statistics from the Ministry of Justice which indicate that the majority of offences being recommitted are that of theft and sexual offences.

The Ministry of Justice statistics on proven re-offending show that in 2010, domestic burglary had the highest proven re-offending rate at 48.5% and sexual (child) offences the lowest at 9.6%.[391] As discussed in Chapter IV, the new CJA rules in section 103(2)(b) and 103(4)(b) specifically targeted child sex offences when evidence is adduced under gateway (d) where there is 'an important matter in issue between the defence and prosecution'. There is the possibility that because it is now easier for propensity evidence of this nature to be readily adduced, over the seven years that the new provision was in force, the number of re-offences has in turn reduced to reflect this amendment.

[389] Levanon (n 388) 681.
[390] *Criminal Justice Act 2003 (Categories of Offences)* (UK) SI 2004/3346. ('COO')
[391] Ministry of Justice, *Proven Re-Offending Statistics Quarterly Bulletin January to December 2010* (England and Wales) (Page 11, 25 October 2012).

Proven Re-Offending Statistics for 2020

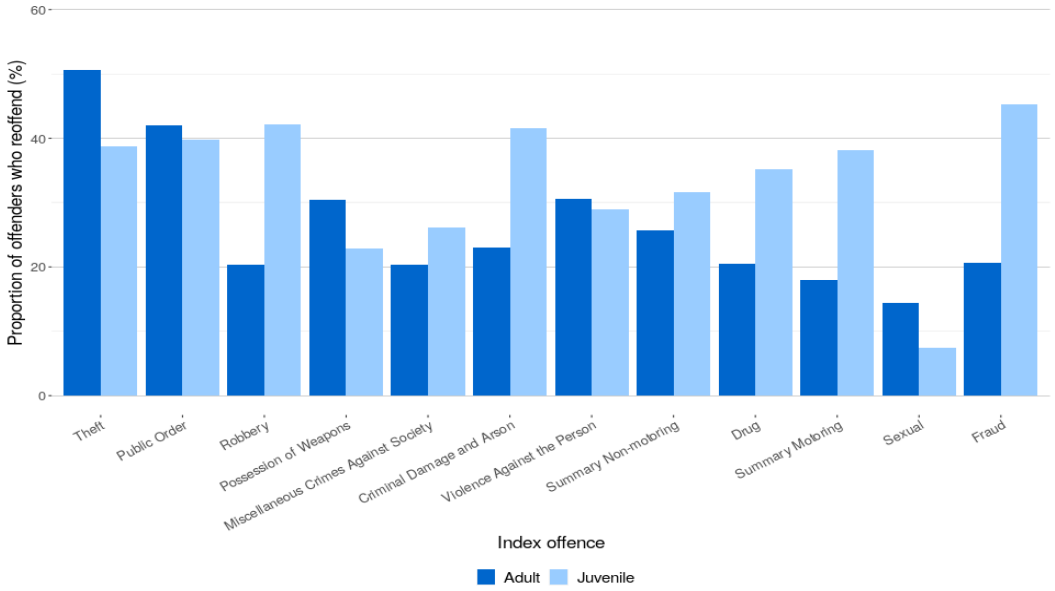

Table 9 - cited from Ministry of Justice Proven re-offending statistics 2020

The table above shows the comparison from 2020, which indicates that currently the lowest rate of reoffending in the adult cohort was observed amongst those who committed a sexual offence, with a rate of 14.4%.[392] The reasoning behind the increase, as previously mentioned, could reflect the statistical cohort number decrease from the Covid-19 pandemic.[393]

As previously mentioned, England's recidivism rate in 2021 was 25.6%. In comparison, the Australian latest 2022 statistics reveal that the current rate sits much higher at 45.2%. The Australian statistics will be further discussed in Chapter VI.

I *Guilty Plea Rate In England*

"Nothing worthwhile is gained without sacrifice" – Martin Luther King Jr.

One potential anticipated effect of the CJA was the expected increase in guilty pleas. This could be attributed to a defendant understanding that with a prior history of criminal offences, the new CJA rules would now permit the jury to hear his or her criminal history.

[392] Ministry of Justice, *Proven Re-Offending Statistics Quarterly Bulletin April to June 2020* (England and Wales) (28 April 2022).
[393] Ibid.

Should this information become known at trial, the potential existed for the jury to convict the defendant on a higher proportion of the charges faced.

In 2001, the guilty plea rate in England sat at 56%. A guilty plea is recorded when a defendant pleads guilty to all or some counts or pleads not guilty to some or all counts but offers a guilty plea to alternatives which are accepted.[394]

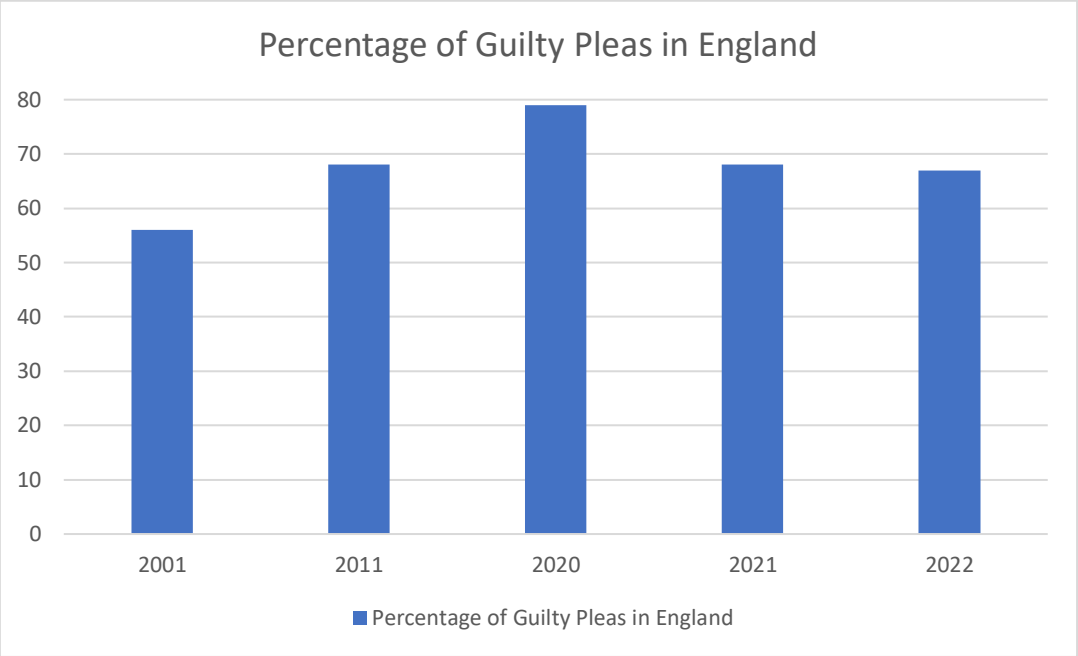

Table 10 – Percentage of Guilty Pleas in England 2001 – 2022.

As can be seen from the table above, the guilty plea rate trended in an upward direction in 2011 sitting at just below 70%. The Ministry of Justice believes that one of the contributing factors to this increase has been the offering of an 'early plea discount'[395] which could, in turn, be interpreted as having its origins in the CJA amendments. The Sentencing Council's Reduction in Sentence for a Guilty plea Definitive Guideline (2017) sets out guidance for the courts when sentencing an offender who has pleaded guilty.[396] The purpose of these guidelines is to encourage defendants who are going to plead guilty to do so as early in the court process as possible.[397] In research conducted by the Sentencing Council on giving reduced sentences to offenders who plead guilty key findings was that, 'The main factor determining whether or

[394] Ministry of Justice, *Judicial and Court Statistics 2011* (England and Wales) (2012).
[395] Ibid.
[396] Jacqueline Beard, 'Reduction in Sentence for a Guilty Plea' (Briefing Paper No 5974 House of Commons Library, 2017) 5.
[397] Ibid 6.

not offenders plead guilty is the likelihood of being found guilty at trial. Weight of evidence and advice from legal representatives were pivotal in offenders' assessments of the likelihood of being found guilty.[398]

With evidence now easily admissible through the CJA gateways, it could be suggested that the CJA amendments were a factor in the increase in guilty pleas.

As table 10 demonstrates, from 2011 to 2020, the guilty plea rate increased to 79%[399] but fell to 68% for the October – December 2021 quarter, which was the level achieved prior to Covid 19. As the court system catches up with cases, it could be predicted that the rates will increase again back up to 2020 numbers.

Statistical information from Australia on the rate of guilty pleas show that in 2008/9 the rate was sitting at around 56%, which is a similar percentage that England was sitting on in 2001. However, in 2020, the rates in Australia show that, with the exception of Queensland, the guilty plea rate has not had the same significant jump in numbers. This will be compared further in Chapter VI.

The increase in the number of guilty pleas is favourable for three reasons: firstly, it is beneficial to the defendant by providing a discount for a reduced sentence; secondly, the lower number of people going through the court system would save the courts time and money; and thirdly, would save witnesses (including victims) from having to attend court to give evidence.[400]

J *Conclusion*

A juror's individual involvement in using prior conviction evidence cannot easily be studied, and this thesis does not attempt to do so. However, this thesis has attempted to address all the factors surrounding whether the CJA created a higher risk of jury prejudice towards a defendant as well as what impact there has been on the level of recidivism.

The decision on whether a jury should hear prior conviction evidence has all but been resolved since the introduction of the CJA and the new provisions surrounding the admission of bad character evidence. With evidence of propensity and prior convictions now more frequently adduced, the CJA implemented a new set of checks and balances to ensure that despite the increase of bad character evidence being admitted, the defendant is still able to

[398] Beard (n 396) 7.
[399] Ministry of Justice, *Criminal Court Statistics Quarterly* (England and Wales) (October to December 2021, published 2022) 10.
[400] Beard (n 396) 3.

receive a fair trial. As previously discussed, the new provisions of the CJA will only allow evidence of bad character to be admitted if it falls under the definition of bad character. Once bad character has been established, then the evidence must pass through one of the seven gateways and meet the requirements of the 'fairness' test. Each gateway contains its own elements for admission which must be met and only then will the evidence be admitted. Once the evidence has been introduced, there are directions that must be given to the jury through the Crown Court Compendium which not only states general guidelines, but also states specific guidelines that must be met for each of the gateways as well as directions to ensure the jury understands the burden and standard of proof. These guidelines provide an additional safeguard for the defendant to receive a fair trial. Once the jury has been directed on how to use the evidence, it is then their decision to determine the outcome of the trial.

Despite the issues raised on how juries use prior conviction evidence, it has been established through mock jury studies by Honess and Mathews and Australia's Goodman-Delahunty and Martschuk that juries are capable of making decisions 'not based on prior convictions' but also that unfair prejudice was 'overstated'.

When looking at the statistical rates of recidivism in England, there does appear to be a decrease in the recidivism levels since the enactment of the CJA. How much of an impact the CJA amendments and other government programs have made towards the downward trend in recidivism unfortunately cannot be measured accurately, especially since the advent of the Covid 19 pandemic, but there is a high probability that some positive impact occurred. Another outcome that could be traced to the introduction of the CJA amendments is the increased number of guilty pleas. It is probable that there is a correlation between the increased admission of prior conviction evidence and the increase in early guilty pleas based on the easier admission of bad character evidence.

It can be concluded that the language and provisions in the CJA amendments, as interpreted by the courts, along with jury directions for evidence admitted by the Crown Court Compendium, the potential for a defendant to receive an 'unfair' trial under the CJA is minimal based on the checks and balances required which have not tilted the scales in favour of the prosecution, as some opponents perceive, but have levelled out the playing field between the prosecution and the defendant in terms of the jury's knowledge of the defendant's prior convictions.

The next chapter will compare the CJA amendments with the Evidence Acts in Australia to provide a detailed picture of how the two countries differ in terms of the legislative

treatment of bad character and propensity evidence. In addition, the different rates of recidivism and guilty pleas between England and Australia will be examined.

CHAPTER VI – COMPARISONS BETWEEN AUSTRALIA AND ENGLAND

"Whatever affects one directly, affects all indirectly" – Martin Luther King Jr

A *Overview*

Chapters I to V have detailed the rules of bad character and propensity evidence in Australia, the pre and post-CJA amendments on bad character and propensity evidence, jury prejudice, jury directions, and recidivism rates in England. This chapter will merge these various assessments and compare where the similarities and differences between the countries lie in order to argue why the CJA amendments would be a suitable approach for Australia to adopt.

The first comparison will be on the bad character rules in England and Australia, followed by the propensity rules. Jury prejudice and jury directions will follow as to how Australia deals with these areas will be discussed. Finally, a comparison of the recidivism rates of England and Australia where statistics will indicate that this is an area where Australia has considerable scope to improve its performance.

At the end of this Chapter, a holistic, comprehensive picture of both England and Australia will be presented with the intention of showing how these two countries have taken separate paths despite a common legal heritage. A discussion on why Australia has not given any consideration to adopting the amalgamation of the bad character and propensity rules pioneered in England will be also addressed.

B *Legislation Differences And Similarities: England vs Australia*

What can be concluded from Chapters II to V is that until 2003, the rules surrounding bad character and propensity evidence in England and Australia were virtually identical. And, until 1995, all the Australian states and territories followed England by enacting the procedures for the admission of bad character under the *Criminal Evidence Act 1898* (England), as shown by table 5 in Chapter IV. As previously mentioned, when discussing bad character, Queensland is analysed as indicative of the other common law states of South Australia and Western Australia. Whilst bad character provisions in Australia followed England, the rules surrounding

propensity evidence were also very similar with only minor differences between the cases of *Boardman* in England and *Pfennig* in Australia until 1995 when the UEL was enacted.

As discussed in Chapter II regarding bad character evidence, the enactment of the UEL in 1995 introduced section 104(5) and 104(6) which is consistent with Queensland's bad character rules in sections 15(2)(a) and 15(2)(d) of the *Evidence Act 1977* (Qld). Chapter II also mentioned section 110 of the UEL generally replicates the meaning of section 15(2)(c) of the *Evidence Act 1977* (Qld). This chapter also discussed how the language used in the UEL for bad character evidence legislation has been said to be more 'prescriptive' as well as 'varying the common law's all or nothing approach' in that the UEL in sections 110(2) and (3) distinguishes between good character generally and good character in a particular respect. However, the differences between the UEL and the *Evidence Act 1977* (Qld) are minimal and both broadly reflect the *Criminal Evidence Act 1898* (England).

In addition to introducing new bad character rules adopted by the Commonwealth and New South Wales, which only made marginal changes to the common law, amendments were also made to the rules surrounding propensity evidence. Whilst Queensland, South Australia and Western Australia continued at that time to use the propensity test from *Pfennig*, the UEL separated the propensity rule into section 97 tendency, section 98 coincidence, and section 101 further restrictions on tendency and coincidence evidence adduced by the prosecution. This was to slightly lower the high admission bar of *Pfennig*. Though the UEL was seen to be a watershed moment for Australia, when taking a closer look at the differences between the UEL and Queensland, the UEL seems to have only adjusted the law rather than making any significant changes as regards to bad character and propensity evidence. The differences between jurisdictions is more marked in propensity following the statutory changes made to *Pfennig* in Western Australia (2004) and South Australia (2011).

In 2003, the CJA was enacted in England which revolutionised the use of bad character and propensity evidence by combining the two into one piece of legislation. As can be seen from Table 1 in the Introduction, Australia has continued with the separate use of bad character and propensity evidence for the three common law states and the UEL states and territories and whilst the *Pfennig* test is still used in Queensland, there have only been minor modifications made to the *Pfennig* test by the other states and territories in Australia. The most recent amendment to the Australian propensity rules is the addition of section 97A in New South Wales, the Northern Territory, and the Australian Capital Territory. Section 97A most closely resembles the outcome the CJA has accomplished with section 103(2) and (4), by providing a rebuttable presumption for evidence relating to child sexual offences. As only three of the UEL

jurisdictions have now adopted this new section, it is still evident that Australia is only making marginal legislative changes and only in relation to propensity evidence discussed in Chapter III.

C *Prior Conviction Evidence*

Prior conviction evidence is considered a specific form of propensity evidence and in Australia, falls under the shield of bad character evidence. This shield can only be lowered under limited exceptions as shown in table 2 in Chapter II. This is because, under the common law rules, the use of prior convictions may establish guilt based on previous offences rather than the offence being tried, which could result in unfair prejudice towards the defendant.

The CJA on the other hand has removed the distinction between bad character and propensity evidence and treats it under a combination of sections 98 and 101.

Treatment of Prior Conviction Evidence in Australia vs England

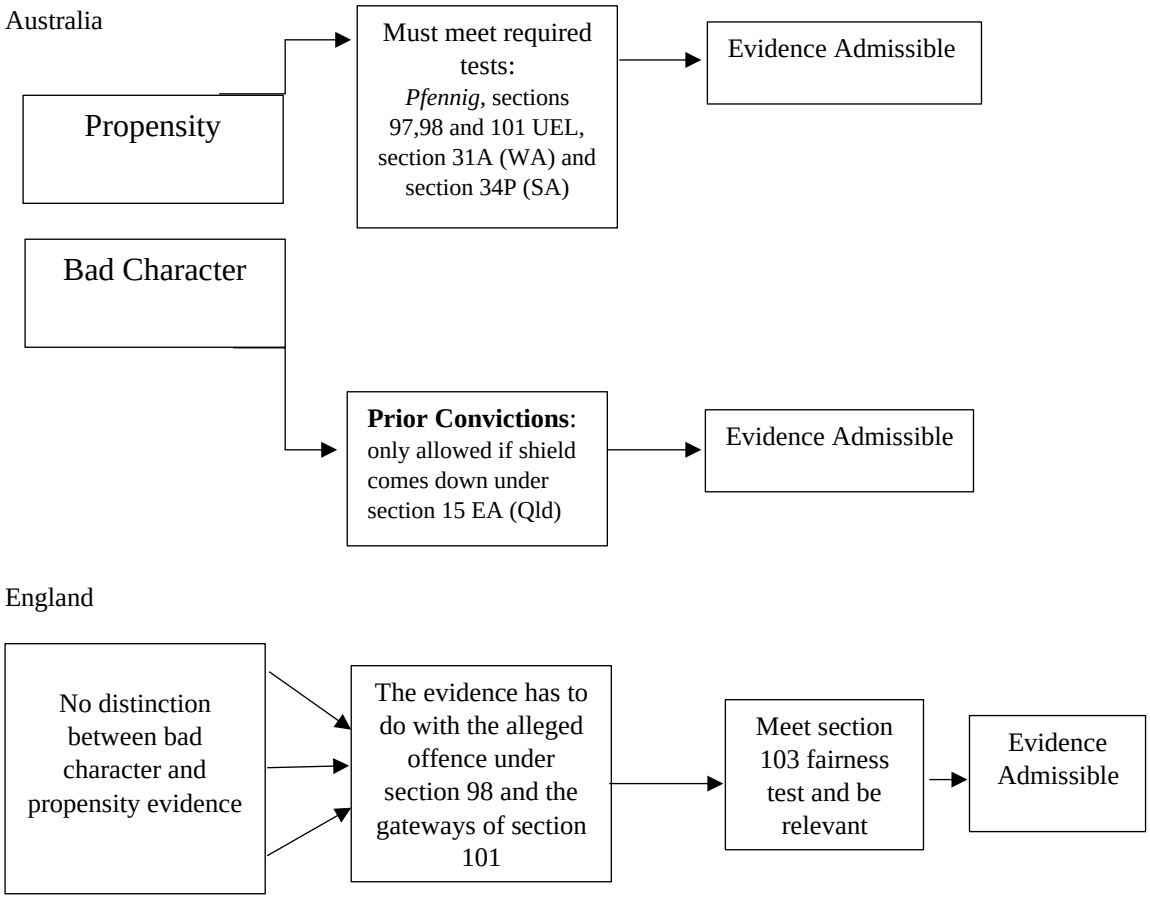

Table 11 – Differences between how Australia and England treat prior conviction evidence.

Though South Australia and Western Australia generally follow the common law, they introduced their own amendments to propensity evidence with the introduction of section 31A in Western Australia in 2004 and section 34P in South Australia in 2011.

In England, the introduction of section 98, to the CJA created a definition for 'bad character' as discussed in Chapter IV section D. This provided the Crown with the ability to adduce evidence which, in addition to evidence that is related to the offence charged, shows 'a disposition towards misconduct on…[a person's], other than…'.[401] This broadens the admissibility of bad character evidence greatly, where Australia still has a narrower approach under section 15 of the *Evidence Act 1977* (Qld), which states that only evidence relating to the offence charged is allowed to be admitted, which increases the likelihood of shielding the defendant.

Where section 99 of the CJA amended the common law, in doing so it removed the previous shield provided under the old bad character evidence provision. This was one of the revolutionary changes that the CJA made, whereas Australian defendants are still protected by the shield under section 15 of the *Evidence Act 1977* (Qld).

Section 101 of the *CJA* provides that evidence of a defendant's bad character is admissible, but only if it passes through one of seven specified gateways under (a) to (g) as shown in Chapter IV, table 6. The focus of Chapter IV was on gateway (d) regarding propensity evidence. These gateways are the second revolutionary change made by the CJA as these gateways have not only expanded and defined more avenues in which evidence can be admitted but have also separated propensity evidence from prior convictions. Again, Australia has done little in the development of its bad character provisions and currently is not inclined to make any new amendments. It is not clear whether any of the Australian jurisdictions have given thought to re-examining the bad character provisions which date back to the 19th century.

In conclusion, despite the changes that the UEL made to the bad character and propensity evidence rules in 1995, and the new addition of section 97A in New South Wales and the Northern Territory, Australia has done little in making any real changes to the legislation from that previously enacted in England prior to the CJA. The CJA was a revolutionary change which altered the course of how bad character and propensity evidence would be treated. A summary of the differences between England and Australia are as follows:

Firstly, was that the CJA amended the common law which had been in place for hundreds of years. One of the decisions to do this included public concern that prior criminal

[401] *Criminal Justice Act 2003* (E & W) s 98.

records of defendants for similar offences were being unreasonably withheld from the jury, which arguably remains the case in Australia.

Secondly, Australia does not provide a definition for bad character evidence, whereas the CJA does. In doing this, the CJA has made all evidence potentially 'admissible' whereas Australia still follows the rule that all evidence is potentially 'inadmissible'. Not one jurisdiction in Australia has made the decision to codify what is admissible under bad character.

Thirdly, the CJA amendments now provide seven gateways which are focused on how evidence can be adduced. These gateways allow the Crown to adduce not only bad character evidence but also evidence of propensity under the same umbrella. Australian legislation is restricted due to its lack of definition and insistence on the separation of bad character and propensity.

Fourthly, in addition to expanding the admission of bad character evidence, the CJA has also separated propensity evidence from prior conviction evidence which has expanded the capacity for more evidence to be adduced. Australia still operates on the premise of keeping bad character and propensity evidence separate with no apparent scope for the use of prior conviction evidence in the future.

These four differences not only show just how far England has moved away from the 1898 legislation but also seek to understand why Australia has not followed suit.

D *Jury Prejudice*

"Mercy to the guilty is cruelty to the innocent" – Adam Smith

As discussed in the preceding Chapter, the main reasoning behind preventing a jury from hearing about prior conviction evidence is due to the potential prejudice it may have on the jury's verdict. However, since the CJA came into effect in England, the introduction of prior conviction evidence has become more common-place. Whether a jury should or should not hear prior conviction evidence has been the subject of debate in both England and Australia.

In Chapters II, III and IV, the differences as to how bad character, prior convictions and propensity evidence are treated in England and Australia currently have shown to be significant and the impact these differences could have on jury prejudice will now be discussed.

It is clear that the Crown's ability to adduce bad character and propensity evidence in Australia is constrained, not only due to the common law and UEL shield created for the

defendant's protection against jury prejudice, but also the various jurisdictional tests for propensity evidence. While all Australian jurisdictions continue to follow the inherited common law tradition in regard to bad character evidence, the high bar used for the admission of propensity evidence has slowly been lowered by all states and territories, as seen in table 4 of Chapter III, except Queensland who still follows the strict test in *Pfennig*. It could be said that keeping the common law shield and the high bar of *Pfennig* in Queensland, has left the opportunity for jury prejudice undisturbed. So, what does this mean for jury prejudice in the other states and territories that have lowered this bar compared to England?

Despite all the other states and territories lowering the admission of propensity evidence, there is still a low risk of jury prejudice. This is because, in all States and Territories, both common law and UEL jurisdictions have retained the shield for prior convictions. Thus, it is only in those jurisdictions that have, on public policy grounds, made it easier for the Crown to adduce propensity evidence, that the possibility of increased juror prejudice has emerged.

As was pointed out in section I, even in the area of propensity evidence, the bar for admission is still high except for section 97A of the *Evidence Act 1995* (NSW), *Evidence Act 2012* (NT) and *Evidence Act 2011* (ACT) for child sexual offences.

Section 97A on its face appears to have the beginnings of an Australian version of section 103(2) of the CJA with its rebuttable presumption for child sexual offences, allowing prior conviction evidence relating to child sexual offences to be introduced before a jury. Although the lowering of the bar in section 97A might increase the potential for jury prejudice in Australian courts, the seriousness of these types of offences was taken into consideration by policy makers and flowed from the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. However, section 97A is written such that the defendant's capacity to exclude the tendency evidence is singularly constrained and is more draconian than section 103(2) of the CJA.

The rebuttable presumption is found in section 97A(2) which states 'it is presumed' that the evidence 'will have significant probative value' regarding the sexual interest the defendant 'has' or 'had' in children. Section 97A(3) continues with the words that subsection (2) applies 'whether or not' the sexual interest or act evidence is directed to 'a complainant', 'any other child' or, 'children generally' in the proceedings. Clearly, section 97A(3) is very broad in its application with the use of the word 'generally'. Following on from section 97A(3), section 97A(4) appears to give some protection to the defendant by allowing the court the ability to determine if the evidence has no 'significant probative value' if they are 'satisfied' there are 'sufficient grounds' to do so. However, despite section 97A(4), section 97A(5)

essentially makes subsection (4) redundant by listing a number of matters (a) to (g)[402] which are 'not' to be taken into consideration by the court when determining what the sufficient grounds are. This list of matters is very comprehensive in what it includes which begs the question; what is left?

It is apparent that section 97A significantly lowers the bar for the admission of tendency evidence well beyond the reach of the CJA amendments. However, because the same checks and balances in the CJA are not provided to the defendant for child sexual offences, section 97A has the potential to create the *highest* risk of jury prejudice in Australia. Conversely, in England, despite the same rebuttable presumption that all evidence should be adduced for bad character, propensity and prior conviction evidence, the potential for jury prejudice has been minimised due to the balance that this evidence is only allowed to be admitted if it falls under an important matter in issue which overall is less dangerous than section 97A.

Furthermore, it should be noted that section 101(2) in New South Wales, Northern Territory and Australian Capital Territory, has been amended to remove the word 'substantially' in the balancing act between probative value and unfair prejudice. Thus, not only is the bar reduced for child sexual offences by virtue of section 97A and section 101(2), but section 101(2) also applies to section 97 and section 98 generally. This means the potential for jury prejudice to increase in New South Wales, Northern Territory and Australian Capital Territory, is not confined to child sexual offences as the lowering of the balancing act in section 101(2) applies to tendency and coincidence generally.

E *Recidivism Rates*

As discussed in Chapter V, the recidivism rate in England between the years 2008 and 2021 reduced from 31.6% to 25.6%. Reasonings behind this could be contributed to the numerous reforms made to the criminal justice system through the implementation of the

[402] *Evidence Act 1995* (NSW) s 97A(5)(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.

government's 'White Paper' report amending the CJA. Included in these reforms were changes to the bad character and propensity evidence rules.

Australia in 2004, saw the number of prisoners (24,171) who had prior convictions sitting at 13,907 (57.5%).[403] In 2005, this number increased by 10.1% to 15,308.[404] This rate fluctuated between 15,000 and 16,000 prisoners for the following eight years until 2013 when the rate increased another 10% to 17,799.[405] In 2014, this number rose by another 11% to 19,780. [406] Looking ahead to 2021, the total number of prisoners in Australia has not only increased by 5% (1,910) to 42,970 but the number of prisoners who have had a prior conviction has risen to 25,723 (59.8%), another increase of 5% from the previous year.[407]

In July 2020, the Sentencing Advisory Council in Victoria updated the research for prisoners released during 2018-19 who returned to prison within two years for each Australian jurisdiction. The results were as follows:

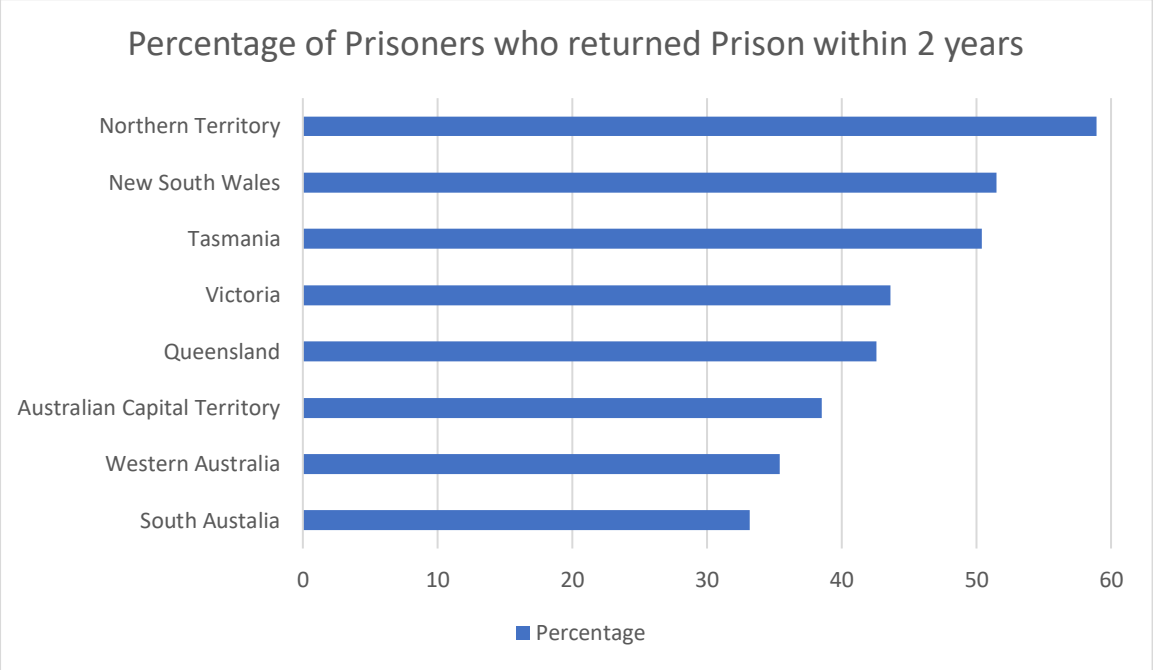

Table 12 - Cited from the Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, Report on Government Services 2022, Part C, Table CA.4 (2022).

[403] Australian Bureau of Statistics, *Prisoners in Australia 2014* (Table 2, Prisoners, selected characteristics 2004-2014).
[404] Ibid.
[405] Ibid.
[406] Ibid.
[407] Australian Bureau of Statistics, *Prisoners in Australia (2021)* (online, Prisoners in Australia, 2021 | Australian Bureau of Statistics (abs.gov.au).

As seen, the Northern Territory had the highest rate of recidivism at 58.9% with South Australia having the lowest rate at 33.2%. The Australian average was 45.2%.

Financially, imprisonment in Queensland costs the community almost one billion dollars each year to fund.[408] The increase in imprisonment rates has said to be driven by policy and system changes and a focus on short-term risk rather than crime rates with the median prison term being given was a short 3.9 months.[409] However, the Queensland Productivity Commission report on imprisonment and recidivism identified that to improve the rates of recidivism, there was firstly a need to overhaul the decision-making architecture of the criminal justice system.[410] This includes recommendations to establish an independent Justice Reform Office to provide a focus on longer-term outcomes and drive evidence-based policy-making[411] and in turn, improve the efficiency and effectiveness of the criminal justice system.[412] While the delivery of this program is still ongoing, it is advised that once implemented, the reforms will likely result in significant reductions in the size of the prison population.[413]

In Queensland, the total number of prisoners increase by 15% (1,295) to 9,952 in 2021 from the previous year, which is the largest annual increase, both numerically and proportionally, of any of the states and territories.[414] In addition to this, the number of prisoners who had prior convictions increased by 14% (838) to 6,797.[415] The offence which had one of the largest increases included sexual assault which rose 16% (163) from 2020 to 2021.[416] Again, it must be noted that the various government restrictions that were implemented due to the Covid 19 pandemic, may have impacted criminal activity and the justice system.[417]

In comparison with England, table 8 shown in Chapter V section H, shows England's recidivism rate sitting at 25.6% in 2020/21 down from 31.6% in 2008/9. This figure is significantly lower than in Australia where, in 2021, the recidivism rate is currently sitting at 45.2%. Although it is difficult to confirm any influence the CJA may have had on these

[408] Kim Wood (Principal Commissioner) and Bronwyn Fredericks (Commissioner), *Queensland Productivity Commission, Final Report: Inquiry into imprisonment and Recidivism (Forward)* (Final Report, August 2019) i. www.qpc.qld.gov.au.
[409] Ibid x.
[410]Ibid.
[411] Ibid.
[412] Queensland Productivity Commission, *Final Report: Inquiry into imprisonment and Recidivism* (Summary Report) 37.
[413] TSA Management, *Justice – Criminal Justice System Reform* (Department of Premier and Cabinet, 2022) (online) www.tsamgt.com/projects/criminal-justice-system-reform-department-of-premier-and-cabinet/.
[414] Australian Bureau of Statistics, *Prisoners in Australia (2021)* Prisoners in Australia, 2021 | Australian Bureau of Statistics (abs.gov.au).
[415] Ibid.
[416] Ibid.
[417] Ibid.

numbers, it can be noted that the trend in the recidivism rate in England has fallen since the CJA amendments were introduced which indicates it could be a contributing factor in the downward trend. These statistics also indicate the extent of the problem that not only Australia, but particularly Queensland, faces with the high rates of recidivism and why action needs to be taken to help reduce these numbers.

F *Guilty Plea Rates*

The guilty plea rate for England in 2001 was sitting at 56% and this rate increased to 79% by 2020[418] with some fluctuations the following year due to the Covid-19 pandemic. Arguably, the reasons behind this increase in guilty pleas may include the CJA amendments which make the admissibility of prior conviction evidence easier for the prosecution. In particular, section 103(4)(b) of the CJA states that propensity evidence may be established by evidence that [the defendant] has been convicted of 'an offence of the "same category" as the one charged' and section 103(4)(b) defines 'same category' as being two offence categories prescribed by the Secretary of State which includes property and underage sex offences.[419] With the understanding that this type of evidence can be introduced during a trial, offenders may be deterred from going to trial knowing the likelihood of being found guilty is higher.

In Australia, the percentage of guilty pleas has increased between the years 2008 to 2021 in all states and territories. Apart from Queensland, the rate of guilty pleas is sitting below the 2020 rates in England, as shown in table 13 below.

[418] Ministry of Justice, *Criminal Court Statistics Quarterly* (England and Wales) (October to December 2021, published 2022) 10.
[419] COO (n 390).

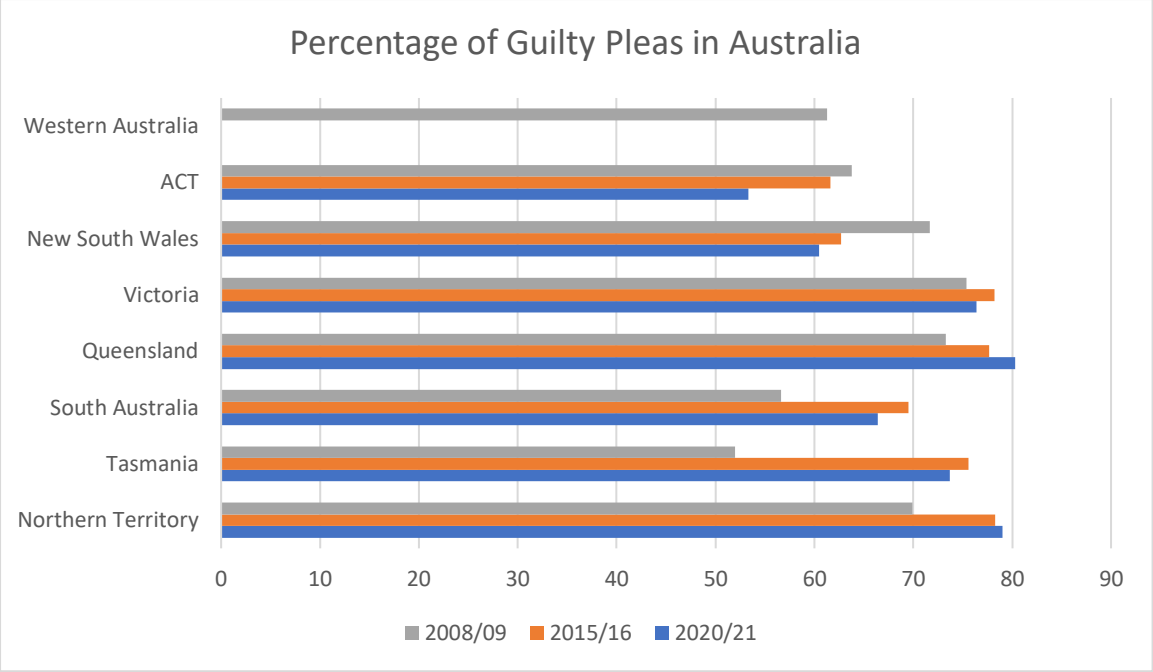

Table 13 – Guilty Plea rates in Australia (2008 – 2021).

All Australian jurisdictions recognise a plea of guilty as a mitigating factor in sentencing, either in statute or through the common law.[420] The reduction in sentencing outcomes resulting from guilty pleas provides both pragmatic value in terms of the financial savings from an early resolution for the state to the public interest in reserving the trial process for those cases where guilt is in genuine dispute.[421] Support for early guilty pleas in Australia is also given on the basis that it helps avoid the need for the victim/s and witnesses to give evidence.[422] Providing a statutory scheme for pleading guilty early in Australia provides transparency and consistency which may in turn, encourage more offenders to enter an early guilty plea.[423]

However, contrary arguments have been raised against the reduction in sentencing for early guilty pleas based on this course of action being contrary to the presumption of innocence

[420] Tasmanian Government Sentencing Advisory Council, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No 10, Oct 2018) ('TGSAC'); NSW – s 25D(2) *Crimes Sentencing Procedure Act 1999* (NSW); SA – ss 10B and 10C *Criminal Law Sentencing Act 1988* (SA); WA – s 9AA *Sentencing Act 1995* (WA); QLD – s 13 *Penalties and Sentencing Act 1992* (Qld); TAS – Recognise a guilty plea as a mitigating factor: recommendation from the Sentencing Advisory Council Final Report - *Sentencing Act 1997* (TAS); CTH – s 16A(2)(g) *Crimes Act 1914* (Cth); NT – s 16A(2)(g) *Crimes Act 1914* (NT) – ALRC, *Same Crime, Same Time, Sentencing of Federal Offenders* (Report No 103, 2006) [11.8]; VIC – s 6AAA *Sentencing Act 1991* (Vic) and ACT – s 37 *Crimes (Sentencing) Act 2005* (ACT).
[421] TGSAC (n 420) vi.
[422] Ibid.
[423] Ibid.

by penalising defendants who proceed to trial or placing undue pressure on innocent defendants to enter a plea of guilty.[424] This is very much a personal decision for the defendant based on the circumstances of the case. From a public interest perspective, the ideal outcome is for all guilty parties to plead guilty.

G *Conclusion*

From 2003 onwards, England and Australia's paths diverged significantly in the area of prior convictions and propensity evidence. What is clear is how much more simplified the CJA amendments are in dealing with the admission of bad character and propensity evidence compared with Australia.

The differences in the legislation and common law tests for propensity evidence between Australia and England were minimal prior to the enactment of the CJA. Although Australia inherited its laws from England, Australia has shown little sign of following in England's footsteps when it comes to addressing bad character and propensity evidence. While Australia has made some strides by looking at statutorily adjusting the use of propensity evidence for all states and territories apart from Queensland, the most significant amendment made was section 97A and 101(2) within the *Evidence Act 1995* (NSW), the *Evidence Act 2012* (NT) and the *Evidence Act 2011* (ACT) with its rebuttable presumption, but only for child sexual offences.

However, on closer inspection, section 97A establishes an admissibility bar lower than the CJA and results in a propensity bar, for child sexual offences, that is practically non-existent and potentially damaging for defendants. This is concerning as it is expected that all states and territories under the UEL jurisdiction will adopt the language in section 97A as well. Section 101(2) and the removal of the word 'substantially', also impacts and lowers the propensity bar for the admissibility of child sexual offences significantly by pushing the protection for a defendant further away from the presumption of innocence.

The above table 11 in section C shows how Australia continues to separate the use of bad character and propensity evidence, whereas England has no distinction between bad character and propensity evidence with the only split being on whether section 98 or section 101 applies. All the reforms in Australia have focused on propensity evidence rather than removing the shield for bad character evidence as it relates to prior convictions.

[424] Ibid.

As discussed in Chapter V at section F, while evidence of prior convictions does have the potential to increase jury prejudice, there is no evidence that the use of this type of evidence admitted through the CJA undermines a fair trial. Psychological studies conducted on mock juries in Australia[425] have also shown that there was no indication that the use of prior conviction evidence of prior sexual misconduct increased unfair prejudice.[426] This study has also indicated that any concerns that juries would lower the standard of proof were unsupported. The study concluded with the statement that 'exclusionary rules to withhold [prior sexual misconduct] evidence from juries warrant reconsideration.[427]

Also discussed in section B of Chapter V , was the division in England when the CJA was enacted due to the potential increase, and in turn increase of jury prejudice, of using bad character and propensity evidence in a criminal trial. However, research showed that conviction rates only increased when there was strong physical evidence presented.[428] The use of directions and guidelines specific to the gateways, as well as explaining the burden and standard of proof to the jury through the Crown Court Compendium, has potentially helped curb any chances of a jury being prejudiced, as the instructions given are comprehensive.

In Australia, the shield protecting bad character evidence and the high bars for the use of propensity evidence has significantly reduced the potential for jury prejudice. This may be beneficial to the defendant but may not represent a level playing field for criminal justice. Although the presumption in Australia is 'innocent until proven guilty', the CJA has shown that a balance can be achieved between adducing more evidence of prior criminal behaviour and maintaining a fair trial. With section 97A being implemented into Australian UEL jurisdictions, the potential for jury prejudice, regarding child sexual offences, is increased with few checks and balances preventing the evidence from being admitted.

A further positive outcome from the CJA amendments can be found in the improved rates of recidivism in England. The comparison between the recidivism rates for England in Table 9 and Australia in section D above shows a significant difference. Whereas the rates in England have dropped continuously from 2008 to 2021, the rates in Australia have increased, despite new policies and system changes recommended by the Queensland Productivity Commission. Whether or not the drop in the recidivism rates in England is due to other factors, evidence that the CJA amendments have contributed to this reduction cannot be excluded. The need for

[425] Goodman-Delahunty (n 374).
[426] Ibid 207.
[427] Ibid 208.
[428] Thomas (n 343) 28.

Australia to decrease the rates of recidivism is imperative and goes towards supporting the title of this thesis in that there is a need for improvement, and with the success that England has had in this area, the answer could lie in implementing a similar system to the CJA amendments in Australia.

In addition to the lower rates of recidivism, England has also shown evidence of an increase in the number of guilty pleas. Again, the CJA amendments have potentially played a role in this increase. Now that prior conviction evidence can be adduced, the risk to the defendant of this information reaching the jury and potentially resulting in a higher sentence means that there is an incentive to plead guilty early. In Australia, evidence has shown that the rates of early guilty pleas have increased slightly, but not at the same rate as in England. This increase in Australia could be contributed to the ability for a defendant to receive a reduction in his or her sentence for pleading guilty but not to encourage a guilty plea without prior convictions being able to be adduced.

These conclusions on the comparisons between England and Australia will be drawn together in the final Chapter. There it will be argued that not only are the CJA amendments a clear and comprehensive piece of legislation that has improved the entire criminal justice system in England but will also touch on the question of why Australia has not considered reform of a similar nature by including both propensity and bad character evidence due to the current state of the recidivism rates and the lopsided approach in concentrating on propensity evidence only.

CHAPTER VII – CONCLUSION

"I have a dream that my children will one day live in a nation where they will not be judged by the colour of their skin, but by the content of their character" – Martin Luther King Jr.

The 2003 CJA amendments in England revolutionised the criminal justice system in terms of the provisions for admitting bad character, prior convictions, and propensity evidence. Since these amendments were introduced, Australian jurisdictions have somewhat surprisingly shown little interest in the impact of the breadth of the CJA amendments. Consequently, Australian jurisdictions have made no attempt to follow and reform the bad character provisions they inherited from England. This thesis has argued that the failure of any Australian jurisdiction to seriously consider the changes made to the CJA in England, through for example a reference to a law reform body, is a major oversight.

As has been discussed in Chapter VI, the approach of Australian jurisdictions to reform of bad character and propensity evidence has focused exclusively on propensity evidence and ignored the potential to reform both bad character (prior convictions) and propensity in a single comprehensive manner. As a result, the shield on prior convictions remains intact in Australia.

Since the High Court case of *Pfennig* in 1995, the admission of propensity evidence in Australian jurisdictions has evolved in the form of statutory amendments to the common law, starting with the enactment of the UEL in the Commonwealth and New South Wales in 1995. Subsequently, Tasmania (2003), Victoria (2009), Australian Capital Territory (2011) and Northern Territory (2012) joined the UEL regime, and thereby adopted the sections dealing with tendency and coincidence evidence rather than the common law. Of the three jurisdictions outside the UEL, Queensland has essentially retained the common law test of Pfennig, while Western Australia (2004) and South Australia (2011) have also statutorily amended the provisions dealing with propensity evidence in their respective Evidence Acts to lower the bar for the admission of propensity evidence.

This singular focus on propensity evidence rather than bad character evidence, in general, has been accentuated by the recent introduction of section 97A in the UEL jurisdictions of New South Wales, Northern Territory, and the Australian Capital Territory. The effect of section 97A is to lower the admission bar for propensity evidence even further than the CJA but is limited to child sexual offences. The limitation of section 97A to child sexual offences

has tilted the focus away from all other offences creating a lopsided approach to propensity evidence in Australian jurisdictions.

However, Western Australia may be considering broadening the scope of section 97A to all other offences. The Law Reform Commission of Western Australia has published a report referring to preparatory work being undertaken with an intention of Western Australia adopting the UEL regime, including section 97A. However, the Law Reform Commission of Western Australia is recommending taking matters a step further with the view that, 'the tendency and coincidence provisions (including section 97A) should be available to assist in proving all offences, whether they are of a sexual nature or otherwise'.[429]

If these recommendations are implemented in Western Australia, the bar for admitting any form of evidence which falls under tendency in Western Australia would be further lowered for any criminal offence and become the closest jurisdiction to mirroring the CJA amendments for propensity evidence. Currently, for New South Wales, Northern Territory and Australian Capital Territory, other non-child sexual offences which involve tendency and coincidence evidence (section 97 and section 98) have only been addressed obliquely by virtue of the amendment of section 101(2) which removed the word 'substantially' for the balancing exercise between probative value and prejudicial effect.

The effect of Australia's focus on propensity evidence rather than bad character, in general, has been to create a lopsided approach as depicted in Table 14 below, which draws on material shown in table 11.

[429] The Law Reform Commission of Western Australia, *Admissibility of propensity and relationship evidence in WA*, Project 112, 11 [3.1].

The bar levels for Bad Character and Propensity Evidence in England and Australia

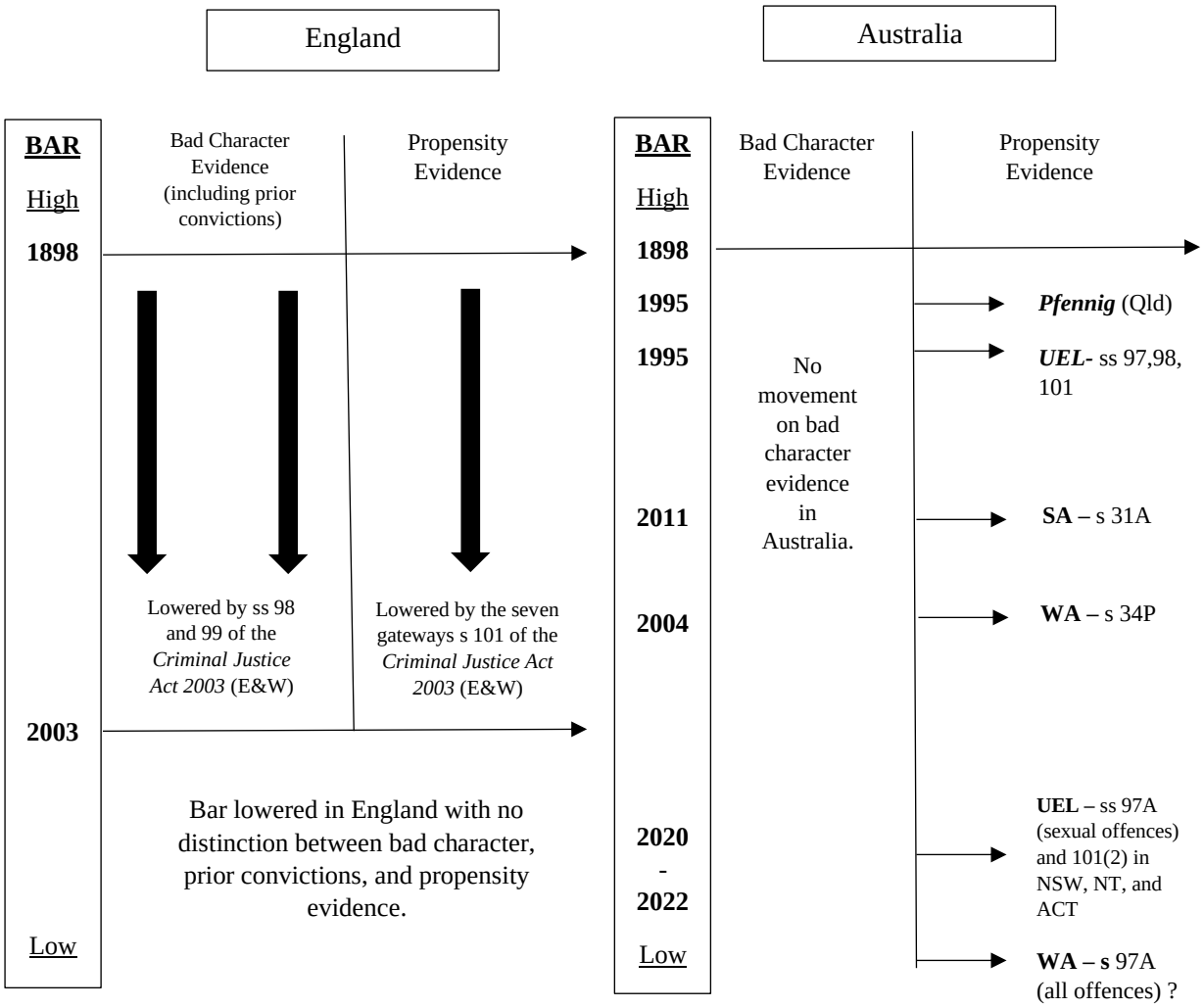

Table 14. Example of how England has lowered the bar for bad character and propensity evidence whereas Australia has made no movement on bad character and only focused on propensity evidence.

Unlike the CJA which has adopted a comprehensive approach to bad character evidence, Table 14 shows that Australia has focused on propensity evidence and in three jurisdictions, child sexual offences in particular. This thesis suggests that such an approach is piecemeal and short-sighted. While there is 'no compelling probabilistic reason to automatically allow past convictions as evidence in trials, there is no reason to always exclude it.'[430]

[430] Ian Hunt, 'A critique of the literature on past convictions and the probability of guilt' (2022) 20 *Law, Probability and Risk* 113, [132].

In addition, this thesis has argued that the CJA amendments have assisted in improving key indicators within the criminal justice system in England including increasing guilty pleas and lowing the recidivism rates, while also preserving a fair trial for the defendant.

There is little doubt that making such a drastic change to legislation in Australian jurisdictions would affect the criminal justice system, but as indicated from the statistical information on the current rates of recidivism and their continual escalation, it is clear that all jurisdictions in Australia need to significantly improve their performance in reducing recidivism rates. One potential answer is to consider the revolutionary changes to the CJA in England and Wales.

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APPENDICES

***Appendix A**. Bad Character And Propensity Evidence Legislation In Australia*

Jurisdiction	**Queensland**	**South Australia**	**Western Australia**	**Uniform Evidence Act**
Bad Character Evidence	s 15 *Evidence Act 1977* (Qld) Questioning a person charged in a criminal proceeding (1) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless – (a) The question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged; (b) The question is directed to showing a matter of which the proof is admissible	s 18 *Evidence Act 1929* (SA) Accused person competent to give evidence (1) Every person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person charged is charged solely or jointly with any other person; Provided as follows: (e) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless – (i) the evidence to be elicited by the question is admissible as tending to	s 8 *Evidence Act 1906* (WA) Accused persons in criminal cases (1) Except as in this Act it is otherwise provided, every person charged with an offence shall be a competent but not a compellable witness at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person: Provided as follows – (e) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other that that wherewith he is then charged, or is of bad character, unless - (i) the proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally, or by his advocate, asked questions of the witness for the prosecution with a	*Evidence Act 1995* (Cth) Part 3.8 – Character s 104 Further protections: cross-examination of accused (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103. (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave. (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether a defendant: (a) is biased or has a motive to be untruthful; or (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or

	evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged; (c) The person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceedings; (d) The person has given evidence against any other person charged in that criminal proceeding.	show that he is guilty or not guilty of the offence with which he is charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character; or (iii) he forfeits the protection of this paragraph by virtue of subsection (2); or (vi) he has given evidence against any other person charged with the same offence. s 27 How far a party may discredit his or her own witness A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but if the judge is of opinion that the witness is adverse, the party may –	view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations of the character of the prosecutor or the witness for the prosecution or a person who died as a result of the offence wherewith he is then charged; or (iii) he has given evidence against any other person charged with the same offence; (f) When paragraph (e)(ii) or (iii) is or becomes applicable to any person charged who gives evidence for the defence, it shall be open to the prosecution, or to any other person charged against whom he has given evidence, to call evidence, that such person is of bad character or has been convicted of or charged with any offence other than that with which he then stands charged, notwithstanding that the case of the prosecution or of such other person charged may already have been closed.	(c) has made a prior Inconsistent statement. (4) Leave must be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that: (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful; and (b) is relevant solely or mainly to the witness's credibility. (5) A reference to subsection (4) to evidence does not include a reference to evidence of conduct in relation to: (a) the events in relation to which the defendant is being prosecuted; or (b) the investigation of the offence for which the defendant is being prosecuted. (6) Leave is not to be given for cross-examination by another defendant unless: (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking

		(a) contradict the witness by other evidence; or (b) with the permission of the judge, prove that the witness has made, at any other time, a statement inconsistent with his present testimony: Provided that, before giving such last-mentioned proof, the circumstances of the supposed statement sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made the statement.		leave to cross-examine; and (b) that evidence has been admitted. s 109 Application This part applies only in a criminal proceeding. s 110 Evidence about character of accused persons (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in particular respect, a person of good character. (2) If evidence adduced to prove (directly or indirectly) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or indirectly) that the defendant is not generally a person of good character. (3) If evidence adduced to prove (directly or indirectly) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or indirectly) that the defendant is

				not a person of good character in that respect.

Jurisdiction	**Queensland**	**South Australia**	**Western Australia**	**Uniform Evidence Act**
Propensity Evidence	s 132A *Evidence Act 1977* (Qld) Admissibility of similar fact evidence In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the grounds that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any. s 132B Evidence Act 1977 (Qld) Evidence of domestic violence (1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 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, section 13.	s 34O *Evidence Act 1929* (SA) Application of Division (1) This Division applies to the trial of a charge of an offence and prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency. (2) This Division does not apply to- (a) Evidence adduced pursuant to section 18; or (b) Evidence of the character, reputation, conduct or disposition of a person as a fact in issue. s 34P Evidence Act 1929 (SA) Evidence of discreditable conduct (1) In the trial of a charge of an offence, evidence tending to suggest that a defendant had 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	s 31A *Evidence Act 1906* (WA) Propensity and relationship evidence (1) In this section – Propensity evidence means- (a) Similar fact evidence or other evidence of the conduct of the accused person; or (b) Evidence of the character or reputation of the accused person or of a tendency that the accused person has or had; Relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time. (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers- (a) That the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and (b) That the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial. (3) In considering the probative value of evidence for the purpose of subsection (2) it is not open to the	s 97 Tendency Rule (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless… (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant value. s 98 Coincidence Rule (2) 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… (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant value.

		(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.	court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.	

		s 34S Evidence Act 1929 (SA) Certain matters excluded from consideration of admissibility Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following: (a) There is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; (b) The evidence may be the result of collusion or concoction.		

Section 97A – New South Wales, Northern Territory, and the Australian Capital Territory	s 97A Admissibility of tendency evidence in proceedings involving child sexual offences (1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue. (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. (3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally. (4) Despite subsection (2), 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. (5) The following matters (whether considered individually or in combination) 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 (whether considered individually or in combination) to warrant taking them into account-- (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. (6) In this section-- **"child"** means a person under 18 years of age. **"child sexual offence"** means each of the following offences (however described and regardless of when it occurred)-- (a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence, or (b) an offence against, or arising under, a law of this State involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence, or (c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b), but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

***Appendix B**. Bad Character And Propensity Evidence Legislation In England*

Timeline of reports to the *Criminal Justice Act 2003*.

Report	Year	Intention/Why written	Main Recommendations
Criminal Law Revision Committee (CLRC)	1972	- to review the law of evidence in criminal cases an to consider whether any changes are desirable in the interests of justice - what provisions should be made to modifying these rules	- If an accused admits conduct in regarding the charged but denies it constituted an offence, evidence of other conduct tending to show a disposition to commit the kind of offence charged, would become admissible. - where evidence of other conduct is admissible, evidence of a similar conviction would be admissible in conjunction with current evidence. - Amendments to clauses on the rules as to cross-examination of the accused about other misconduct - to extend the "good character" exception to deal with those who seek to establish a "good disposition or reputation" "directly or by implication".
Royal Commission on Criminal Justice	1993	- directed by Government to examine the effectiveness of the criminal justice system in England and Wales.	- Agreed with the CLRC: it should be open to the prosecution to introduce evidence of previous convictions where he or she admits conduct which he or she is accused but denies any criminal knowledge or intent. - where a defendant claims to be of blameless reputation the prosecution can prove by cross-examining on previous convictions and if the credibility of a prosecution witness is attacked, it must be possible for the prosecution to lead evidence of previous conviction of a defendant even if no evidence is given by them.
Law Commission	1994	- The Home Secretary asked to consider the law of England and Wales on evidence of previous misconduct in criminal proceedings and to make recommendations.	- in any trial, the central set of facts about any party's evidence should be free to adduce without constraint, including evidence of bad character and evidence will fall into this set of facts if it has to do with the offence charged or shows evidence of misconduct
Criminal Justice: The Way Ahead	2001	- Government's focus on reducing the crime rate	- close the gap to bring more criminals to justice by targeting persistent offenders by ensuring punishments fit the criminals as well as the crime
The Auld Report	2001	- Lord Chancellor, the Home Secretary and the Attorney-General asked for a review of the criminal courts	- Recommended consideration of the report made by the Law Commission in the context with a wider review of the law on criminal evidence
White Paper: Justice for All	2002	- Built on paper The Way Ahead to further discuss the rules on admitting previous conduct and other misconduct	- Where previous convictions or other misconduct are relevant, unless prejudicial, the court should be allowed to hear about it
Criminal Justice Bill	2003	- Presented to Parliament by the Secretary of State for the Home Department to make further changes to the criminal justice system.	- Implemented many of the proposals from the Justice for All paper

Appendix C *– Sections 98, 99 And 101 – 105 Criminal Justice Act 2003 (E &W).*

98 Bad character

References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

99 Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

100 Non-defendant's bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

(a) it is important explanatory evidence,

(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole,

or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

(a) the nature and number of the events, or other things, to which the evidence relates;

(b) when those events or things are alleged to have happened or existed;

(c) where—

(i) the evidence is evidence of a person's misconduct, and

(ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

(d) where—

(i) the evidence is evidence of a person's misconduct,

(ii) it is suggested that that person is also responsible for the misconduct charged, and

(iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

101 Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

(a) all parties to the proceedings agree to the evidence being admissible,

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,

(c) it is important explanatory evidence,

(d) it is relevant to an important matter in issue between the defendant and the prosecution,

(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,

(f) it is evidence to correct a false impression given by the defendant, or

(g) the defendant has made an attack on another person's character.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

102 Important explanatory evidence

For the purposes of section 101(1)(c) evidence is important explanatory evidence if—

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

(b) its value for understanding the case as a whole is substantial.

103 Matter in issue between the defendant and the prosecution

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—

(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;

(b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

(a) an offence of the same description as the one with which he is charged, or

(b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2)—

(a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 101(1)(d).

(7) Where—

(a) a defendant has been convicted of an offence under the law of any country outside England and Wales ("the previous offence"), and

(b) the previous offence would constitute an offence under the law of England and Wales ("the corresponding offence") if it were done in England and Wales at the time of the trial for the offence with which the defendant is now charged ("the current offence"),

subsection (8) applies for the purpose of determining if the previous offence and the current offence are of the same description or category.

(8) For the purposes of subsection (2)—

(a) the previous offence is of the same description as the current offence if the corresponding offence is of that same description, as set out in subsection (4)(a);

(b) the previous offence is of the same category as the current offence if the current offence and the corresponding offence belong to the same category of offences prescribed as mentioned in subsection (4)(b).

105 Evidence to correct a false impression

(1) For the purposes of section 101(1)(f)—

(a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;

(b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if—

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,

and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) "conduct" includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).

Appendix D *– Crown Court Compendium General Guidelines*

12-2 DIRECTIONS APPLICABLE TO ALL CJA SECTION 101(1) "GATEWAYS"

ARCHBOLD 13-25; BLACKSTONE'S F13.1 and 15

Directions

1. In the case of disputed bad character evidence, the jury must be reminded of the evidence on both sides (whether it be prosecution and defendant or one defendant and a co-defendant). The jury must be directed both as to the potential use to which the evidence may be put and also how it should not be used: see *Hackett*[431] and *Adams*.[432] The jury must also be directed carefully about how to approach disputed evidence in relation to propensity, see *Mitchell*[433] including by reference to the standard of proof that may be applicable depending on whether the evidence is relied upon by the prosecution or the defence.[434]

2. Where D has disputed that he/she is guilty of an offence of which D has been previously convicted, where the conviction has been proved, it is to be presumed that D committed that offence unless the contrary has been proved on the balance of probabilities, see PACE section 74(3); C.[435] A bare assertion by D that he/she did not commit the earlier offence, does not trigger a requirement for the prosecution to prove that D was guilty of the earlier offence nor to assist D to prove that he/she was not guilty, or to call witnesses for either purpose. The evidential presumption is that the conviction truthfully reflects the fact that D committed the offence. The court in C, at para 15, contemplated the possibility of the prosecution postponing its decision as to whether to call evidence relating to the prior offence until after the defence had closed its case.

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[431] [2019] EWCA Crim 983. Conviction of single count of sexual assault. Appeal based on that the judge failed to direct the jury in accordance with the Crown Court Compendium that they had to be sure of the bad character evidence before they could rely upon it and did not point out that much of the evidence was disputed and conflicting [29] creating prejudice. Appeal allowed and conviction quashed.

[432] [2019] EWCA Crim 1363. Conviction for sexual offences. Grounds for appeal included that the judge did not give jury directions about whether, and if so how, they could rely on the evidence, did not direct the jury about possible collusion and cast doubt on a piece of evidence. Found no directions were given, appeal upheld, and conviction quashed.

[433] [2016] UKSC 55. Conviction of murder. Appealed on the basis that the trial judge did not direct the jury on whether they needed to be satisfied as to the truth of the evidence or whether the evidence established the particular propensity. Conviction quashed; re-trial was ordered.

[434] *L-H* [2020] EWCA Crim 951 and *Gabanna* [2020] EWCA Crim 1473, [103].

[435] [2010] EWCA Crim 2971 and in particular para 14 "...it is essential that the defendant should provide a more detailed defence statement in which, quite apart from setting out his case in relation to the offences with which he is presently charged, he should identify all the ingredients of the case which he will advance for the purposes of discharging the evidential burden of proving that he did not commit the earlier […] offences."

3. In many cases, evidence of bad character will have been admitted through more than one gateway or have become relevant to more than one issue; in such cases directions must be given in respect of all relevant matters in relation to each gateway.

4. The issues to which the evidence is potentially relevant must be identified in detail and the jury directed about the limited purpose(s) for which the evidence may be used (explanatory of other evidence, relevant to an issue including propensity or "hallmark", rebutting a defence, credibility, correcting a false impression etc.).

5. The jury must be directed to decide to what extent, if at all, the evidence establishes that for which the party relying upon it contends (e.g., propensity/ credibility).

6. It is of equal importance to identify any purpose/s for which the evidence may not be used.

7. Depending on the nature and extent of the convictions or other evidence of bad character, consideration should be given to a direction on the effect of the bad character evidence on the credibility of D.

The notes also state that:

2. Jury directions may be given at any stage of the trial. In addition to directing the jury in the summing up, it may help them at the time that the evidence is presented to tell them, in short form, of its relevance and the purposes for which they may, and may not, use it.

14. Identify the evidence of bad character.

15. Identify whether the evidence is admitted or in dispute. If in dispute give appropriate directions as to the burden and standard of proof.[436]

16. If there has been an explanation of it by the defence so that the conclusions to be drawn from it are disputed, identify the differences and their consequences.

17. Identify in detail the issue/s to which the evidence is and is not potentially relevant e.g., propensity, credibility, identity.

18. Give a tailored and fact-specific direction to the jury, indicating that it is for them to decide to what extent, if any, the evidence helps them to decide the issue/s to which it is potentially relevant: *Campbell*.[437] It may be helpful to bear in mind the words of Lord Phillips CJ in the same case as to the jury's assessment of weight.[438]

19. Depending on the nature and extent of the convictions or other evidence of bad character that have gone before the jury a direction as to the effect of the evidence upon D's credibility may be required.

20. If the evidence is exclusively within the limits of section 101(1)(d), the jury should be warned against prejudice against D or over reliance on evidence of bad character and that they must not convict D wholly or mainly on the basis of previous convictions or bad behaviour. If the evidence is in reality "hallmark" evidence and directly relevant to the issue in the case, a warning not to convict wholly or mainly in reliance upon may be inappropriate but this is likely to be a rare factual scenario.

21. On a multi-count indictment, the issue of cross-admissibility should be considered, see Chapter 13.

22. It is also essential to review any directions by reference to Chapter 12-2: Directions applicable to all CJA section 101(1) "gateways".

[436] See *Mitchell* [2016] UKSC 55 and *Gabbana* [2020] EWCA Crim 1473.
[437] [2007] 2 Cr App R 28.
[438] "What should a jury's common sense tell them about the relevance of the fact that a defendant has, or does not have, previous convictions? It may tell them that it is more likely that he committed the offence with which he is charged if he has already demonstrated that he is prepared to break the law, the more so if he has demonstrated a propensity for committing offences of the same nature as that with which he is charged. The extent of the significance to be attached to previous convictions is likely to depend upon a number of variables, including their number, their similarity to the offence charged and how recently they were incurred and the nature of his defence".

Appendix F *– Crown Court Compendium – Burden And Standard Of Proof Guidelines*

BURDEN AND STANDARD OF PROOF

ARCHBOLD 4-444; BLACKSTONE'S D18.27 and F3.48 – 54

Legal Summary

1. Otherwise than in cases of insanity and exceptions created expressly or impliedly by statute, the prosecution bears the burden of proving that the defendant is guilty: *Woolmington v DPP*;[439] *Hunt*.[440] The standard of proof is to the criminal standard: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty.[441]

2. The summing up must contain an adequate direction as to the burden and standard of proof whether or not it has been mentioned by any advocate: *Blackburn*.[442] No particular form of words is essential. The direction is usually given early in the summing up: *Yap Chuan Ching*.[443] What is required is a clear instruction to the jury that they have to be satisfied so that they are sure before they can convict.[444]

3. It is unwise to elaborate on the standard of proof: *Ching* (supra),[445] although if an advocate has referred to "beyond reasonable doubt", the jury should be told that this means the same thing as being sure.

4. Particular care is needed to distinguish between situations where there is an evidential burden[446] for the D to raise a particular defence (e.g., alibi, duress, self-defence, and non-insane automatism), and where the D has the legal burden of proving the defence (e.g., insanity, insane automatism, diminished responsibility, reasonable excuse for having a bladed article/offensive weapon and section 40 of the *Health and Safety at Work Act 1974*[447]).

[439] [1935] AC 462.
[440] [1987] AC 352.
[441] See *Ivor* [2021] EWCA Crim 923 for a recent example of the court considering the relevance of D's knowledge of a complainant's relationship dynamic in the context of the prosecution proving an absence of a reasonable belief in consent.
[442] (1955) 39 Cr App Rep 84 and *Boaden* [2019] EWCA Crim 2284.
[443] *Ching* (1976) 63 Cr App Rep 7.
[444] *Miah* [2018] EWCA Crim 563.
[445] *Ching* (1976) 63 Cr App Rep 7 at para. 11.
[446] *Ali v DPP* [2020] EWHC 2844 (Admin).
[447] *AH Ltd* [2021] EWCA Crim 359.

5. Where the defence bears an evidential burden to raise a defence the burden of disproving it to the criminal standard is on the Crown: *Williams*.[448] There must be some evidence. The issue cannot simply be raised by the defence advocate.[449] In cases in which the defence bears the legal burden of proof, it is to the civil standard: D has to show that it is more probable than not: *Carr Briant*.[450]

[448] (1984) 78 Cr App Rep 276.
[449] *Pascoe Petgrave* [2018] EWCA Crim 1397.
[450] [1943] KB 607.