

TASMANIA  
**LAW REFORM**  
INSTITUTE

***Evidence Act 2001* Sections 97, 98 & 101 and  
*Hoch's case*: Admissibility of 'Tendency' and  
'Coincidence' Evidence in Sexual Assault Cases  
with Multiple Complainants**

ISSUES PAPER NO 15

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## About this Issues Paper

This Issues Paper examines the conduct of trials in sexual offences cases where an accused is charged with offences against several complainants. Specifically, it addresses two issues: (1) the rules of severance and joinder, and (2) where counts are joined, whether the evidence of one complainant can be used to convict the accused of an offence against another complainant. This concerns the operation of the rules relating to tendency and coincidence evidence set out in Part 3.6 of the *Evidence Act 2001* (Tas), and particularly ss 97, 98 and 101. The project was referred from the Board of the Tasmania Law Reform Institute and was approved on 21 November 2006.

## How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the Paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by 31 December 2009.

If possible, responses should be sent by email to: [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

Alternatively, responses may be sent to the Institute by mail or fax:

Address: Tasmania Law Reform Institute  
Private Bag 89,  
Hobart, TAS 7001  
Fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Rebecca Bradfield, on the above contacts, or by telephoning (03) 62262069.

This Issues Paper is also available on the Institute's web page at: [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.

## Acknowledgments

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## **Information on the Tasmania Law Reform Institute**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), and Ms Ann Hughes (community representative).

## Questions

1. Are the rules relating to joinder and/or the cross-admissibility of evidence in sexual offences cases involving multiple complainants satisfactory?
2. Do you think that the current legal position creates difficulties for complainants?
3. Do you think that the current position in Tasmania strikes an appropriate balance between the interests of the accused receiving a fair trial compared to the interests of the community and the need to protect complainants from unnecessary trauma?
4. Should the current law in relation to tendency and coincidence evidence be retained?
5. Should the possibility of concoction be a matter that is determined by the jury? Or should it remain relevant to the test for admissibility of tendency/coincidence evidence?
6. Should there be a presumption created in favour of a joint trial for cases of sexual assault?
7. In what circumstances should such a presumption apply? For example, should it apply irrespective of the cross-admissibility of evidence? Should it apply to child sexual abuse cases or sexual offences generally?
8. Should the special admissibility restrictions that apply for tendency/coincidence be removed, leaving admissibility subject to the rules of relevance and the general discretions to exclude?
9. Should this apply generally? Or is there a place for special classes of offence within which the standard restrictions upon tendency/coincidence evidence do not apply? If so, which offences are within that class and why?
10. If the special admissibility restrictions that apply for tendency/coincidence are removed, should any additional guidance be provided as to how the general discretions to exclude are to be exercised in cases of sexual assault? Or generally?
11. Do you consider that the decision of the High Court in *Phillips* will impact on the cross-admissibility of evidence from multiple complainants under the *Evidence Act 2001*? If so, how?
12. If the High Court in *Phillips* does restrict the admissibility of coincidence/tendency evidence, do you consider that legislation is necessary to overturn the decision as it applies in Tasmania?



# Part 1

## Introduction

### 1.1 Background

*1.1.1* This Issues Paper is concerned with the conduct of trials in sexual offences cases where an accused is charged with offences against several complainants, in other words, the trial is for offences against more than one victim. It examines the way criminal trials run where several people make a complaint of sexual misconduct to the police about the same person. Specifically, it addresses two issues: (1) the rules of joinder/severance (whether all charges should be dealt with in the same trial or whether they should be tried separately), and (2) where counts are joined, whether the evidence of one complainant can be used to convict the accused of an offence against another complainant (the cross-admissibility of evidence). This concerns the operation of the rules relating to tendency and coincidence evidence set out in Part 3.6 of the *Evidence Act 2001*, and particularly ss 97, 98 and 101. The determination of the issue of joinder (whether there are joint or separate trials) in this context is to a significant extent dependent upon the application of the principles relating to the cross-admissibility of evidence. This is because if the evidence on each charge is not cross-admissible in relation to the other charges the court will generally order that the charges be tried separately.<sup>1</sup>

*1.1.2* The problems that arise in this area are created by the restrictions that s 97-101 of the *Evidence Act 2001* place on the cross-admissibility of evidence in respect of different counts where those counts are being tried together. Sections 97-101 restrict the admission of tendency evidence (evidence of an accused's tendency to behave in a particular way) and coincidence evidence (evidence adduced to show the improbability that coincidence provides an innocent explanation for the evidence). Clearly, tendency and coincidence evidence issues will arise whenever there is a question about the cross-admissibility of evidence of multiple charges.<sup>2</sup> Sections 97-101 narrowly confine the admission of tendency and coincidence evidence because juries may accord it excessive value and because its emotional impact may vitiate jurors' objectivity and induce them to convict the accused on unsafe grounds. Accordingly, such evidence will only be admitted if the prosecution establish that its probative value substantially outweighs its prejudicial effect for the accused. The Tasmanian Supreme Court has ruled that in determining whether this test has been met in the context of deciding the cross-admissibility of evidence of multiple sexual offences, the Court should take into account whether there is a reasonable possibility that the complainants have colluded and concocted

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<sup>1</sup> *De Jesus v R* (1986) 61 ALJR 1.

<sup>2</sup> While this Issues Paper considers the rules of tendency and coincidence evidence as the basis for the cross-admissibility of evidence, the evidence of one complainant may be admissible in the trial of another complainant on other grounds. The evidence may be admissible as evidence of a relationship, evidence of opportunity, evidence of prior conduct revealing a motive, contextual evidence, or evidence relevant to a person's state of mind, see discussion in S Odgers, *Uniform Evidence Law*, (7<sup>th</sup> ed, 2006) [1.3.6740]. See also J Anderson et al, *The New Evidence Law* (2002) [95.00]-[95.05].

their allegations against the accused or whether they have been prompted or influenced in some other way to invent allegations against the accused.<sup>3</sup>

1.1.3 In this Issues Paper, it is suggested that the need to exclude collusion/concoction or other influence is problematic on two principal grounds. First, since the decision of the New South Wales Court of Criminal Appeal in *R v Ellis*,<sup>4</sup> which was adopted by the Tasmanian Supreme Court in *Tasmania v S*<sup>5</sup> and *Tasmania v L*,<sup>6</sup> the necessity to exclude the possibility of collusion or other influence is questionable. Secondly, in assessing the possibility of concoction the court will usually conduct a preliminary hearing (a voir dire). The result is that the complainants may be required to give evidence on a number of occasions – on the voir dire and again at trial.

1.1.4 The resolution of these problems requires meeting the needs of all participants – the accused, the prosecution, the complainant and the community. The conduct of the trial must be fair for an accused, but it must also be fair to the complainant and achieve justice for the community. The challenge is to strike the appropriate balance. This paper addresses the issue of whether the current balance is appropriately struck. In considering this issue, Part 2 provides an overview of the current law in Tasmania of the rules of tendency and coincidence evidence, and the rules that govern the joinder/severance of trials. Part 3 considers the need for reform of the law in Tasmania. Part 4 provides an overview of the law in other comparable jurisdictions and Part 5 outlines possible options for reform.

1.1.5 During research for this Issues Paper, the Institute identified the High Court decision in *Phillips v The Queen*,<sup>7</sup> as a case that may present significant hurdles for the prosecution in future Tasmanian cases where it seeks to lead evidence from multiple complainants. The issues raised by this case do not fit within the central focus of this paper as the case was not concerned with allegations of concoction. Further, the case originated in Queensland and so was not decided on the basis of the uniform *Evidence Act* (which applies in Tasmania). However, the Institute’s view is that the case should be considered here, as it is a High Court decision that limited the cross-admissibility of evidence in a case involving allegations of rape by several complainants. Of particular interest are the High Court’s restrictive views about two critical evidentiary principles: (1) relevance; and (2) the probative value of similar fact evidence. This case and the implications for the development of the law in Tasmania are explored in Part 6.

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<sup>3</sup> See *Tasmania v S* [2004] TASSC 84; *Tasmania v L* [2006] TASSC 59; *Tasmania v B* [2006] TASSC 110; *Tasmania v Y* [2007] TASSC 112.

<sup>4</sup> (2003) 58 NSWLR 700.

<sup>5</sup> [2004] TASSC 84.

<sup>6</sup> [2006] TASSC 59.

<sup>7</sup> (2006) 225 CLR 303.

## Part 2

# The Current Law in Tasmania

2.1.1 As set out in Part 1, this Issues Paper is concerned with the cross-admissibility of evidence in cases where an accused is charged with sexual offences in relation to more than one complainant, and the circumstances where counts can be joined in the one indictment and tried together. This Part sets out the current law in Tasmania in relation to the admissibility of tendency and coincidence evidence that governs whether the evidence of one complainant can be used to convict the accused of an offence against another complainant. It also examines the rules that govern whether there will be joint or separate trials. The key concern of the Issues Paper in considering the current law is the relevance of concoction and other influences to these rules, in particular, the extent to which the common law principles set out in *Pfenning v The Queen*<sup>8</sup> and *Hoch v The Queen*<sup>9</sup> still apply to the *Evidence Act 2001* (Tas), s 97, 98 and 101.

## 2.2 Severance of trials in the context of sexual offences cases

2.2.1 Where an accused is charged with multiple counts of sexual offences involving multiple complainants, there are two possibilities in relation to the conduct of the trial: (1) there will be separate trials in respect of each or some of the complainants; or (2) the charges relating to all the complainants will be heard together in the same trial. The question of which of these two options applies in any given trial involves complex questions of law.

2.2.2 The principles that govern the joinder or severance of trials for indictable offences involving a single defendant are set out in the Tasmanian *Criminal Code*. Although the general rule is that an indictment should contain one count only (which means that an accused should be tried for one count only), it is permissible to join charges in the same indictment if they form part of a series of crimes of the same or a similar character, in which case all the charges will be tried together. The *Criminal Code*, s 311(2), provides that:

Except as provided in section 125A(6), charges of more than one crime may be joined in the same indictment, if those charges arise substantially out of the same facts or closely related facts, or are, or form part of, a series of crimes of the same or a similar character. In any other case an indictment shall charge one crime only.

2.2.3 Even if a case meets the threshold test that the rules allow for the joinder of charges (forming part of the series of a crime of the same or a similar character), an accused can still apply for the indictment to be severed. Under the *Criminal Code*, s 326(3) an accused can apply for an order for separate trials where he or she may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one crime in the same indictment, or where for any other reason it is desirable to direct that he or she should be tried separately. In a case involving a number of sexual crimes against more than one complainant, an accused might argue that separate trials should be granted to prevent an injustice. For example, if a jury were to decide a case on the basis of a

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<sup>8</sup> (1995) 182 CLR 461.

<sup>9</sup> (1988) 165 CLR 292.

prejudiced view of the accused rather than a rational assessment of the evidence, the accused would be prejudiced in his or her defence and the outcome of the trial would not be just. This is a very real possibility where a jury hears evidence of an accused’s alleged reprehensible conduct on more than one occasion. Accordingly, the general rule in sexual offences cases is that, where evidence of one count is not admissible in relation to other counts charged in the indictment, ‘absent good reason to the contrary ... the indictment should be severed’.<sup>10</sup> In *De Jesus v R*,<sup>11</sup> the High Court set down the principle that severance is necessary in such cases because of the risk that the jury will improperly use the evidence on all counts when determining guilt on individual counts. Although cross-admissibility does not determine the issue, the general rule is that unless the evidence of one complainant is admissible in relation to the other complainants, separate trials should be ordered.

## 2.3 Tendency and coincidence evidence in sexual offences cases

### *Overview of the Evidence Act 2001*

2.3.1 In Tasmania, ss 97, 98 and 101 of the *Evidence Act 2001* apply whenever issues of the cross-admissibility of evidence on multiple counts arise. Sections 97 and 98 restrict the admissibility of so-called tendency and coincidence evidence in both civil and criminal cases. Section 101 applies only in criminal cases and imposes further restrictions on the admission of tendency or coincidence evidence sought to be admitted by the Crown.

#### *Tendency evidence – s 97*

2.3.2 Tendency evidence is evidence of the character, reputation or conduct of a person, or a tendency of a person.<sup>12</sup> Tendency evidence is ‘evidence that shows that because a person has acted in a certain way on previous occasions, the person is more likely to have acted in a similar way on another occasion’.<sup>13</sup> For example, evidence that the accused has previously sexually assaulted other children may be relied upon to show that the accused has a tendency to sexually assault children and so was likely to have assaulted the complainant.

2.3.3 The *Evidence Act 2001*, s 97 limits the circumstances in which evidence can be used for a tendency purpose, that is to prove a person has a particular tendency to act in a particular way or to have a particular state of mind.<sup>14</sup> Tendency evidence is only admissible if it has significant probative value.<sup>15</sup> ‘Significant probative value’ is not defined in the *Evidence Act 2001*. The test of significant probative value does not have any fixed or absolute meaning. ‘Probative value’ is defined in the Act to mean ‘the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue’.<sup>16</sup> Evidence has significant probative value when it has a greater degree of probative force than having a merely logical connection with the matters to be proved. Its probative

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<sup>10</sup> *Tasmania v S* [2004] TASSC 8, [3] per Underwood CJ. See *Sutton* (1984) 152 CLR 528, 541-547; *De Jesus v R* (1986) 61 ALJR 1, 3,7,8; *KRM v R* (2001) 206 CLR 221, [38].

<sup>11</sup> (1986) 61 ALJR 1; *Hoch* (1988) 165 CLR 292, 294.

<sup>12</sup> *Evidence Act 2001* (Tas), s 97(1), s 3(1).

<sup>13</sup> Criminal Justice Sexual Offences Taskforce, Attorney General’s Department of New South Wales, *Responding to Sexual Assault: The Way Forward* (2005) 73.

<sup>14</sup> *Evidence Act 2001* (Tas), s 97(1).

<sup>15</sup> *Evidence Act 2001* (Tas), s 97(1)(b).

<sup>16</sup> *Evidence Act 2001*, s 3(1).

force in this regard must be significant. This has been expressed in some cases as meaning that the evidence must be ‘important’ or ‘of consequence’<sup>17</sup> in establishing the facts to be proved.

2.3.4 An examination of Tasmanian cases reveals several factors relevant to the assessment of probative value where the tendency in question involves sexual misconduct:<sup>18</sup>

- (1) the real chance of concoction by complainants;<sup>19</sup>
- (2) the number of incidents establishing tendency;<sup>20</sup>
- (3) the degree of similarity between the incidents;<sup>21</sup>
- (4) the other evidence in the case that has been or will be adduced.<sup>22</sup>

These factors were identified in *Tasmania v Y*,<sup>23</sup> as relevant to the assessment of significant probative value. In *Y*, the accused was charged with seven offences against six girls and the Crown joined all charges in the same indictment. The defence applied under the *Criminal Code*, s 326(3) for an order that the counts relating to each of the complainants be dealt with separately, so that there would be separate trials in relation to the allegations of the different complainants. The Crown argued that there was a good reason why the charges should be heard together, viz, that the evidence in respect of each complainant was relevant to the charge in respect of the other complainants as tendency and coincidence evidence.

2.3.5 In considering the issue of severance, Crawford J dealt with the evidence as tendency evidence under the *Evidence Act 2001*, s 97. His Honour considered that the evidence had significant probative value because it explained why the accused (on his own admission) frequently slept in the same beds as the girls and let them drive or steer his vehicle. His Honour considered that significant probative value could be found in the fact that there were several complainants giving evidence of events that were ‘substantially and relevantly similar, and which occurred in substantially similar circumstances’.<sup>24</sup> The possibility of concoction was also considered to be relevant to this question. His Honour held that the improbability of similar stories, unless they have a factual basis, tended to give substantial probative force to the evidence of each complainant: ‘the evidence of them all tends to give substantial probative force to the evidence of each because, subject to the possibility of concoction or contamination of their evidence or minds, it is improbable that they are each telling similar stories, unless they have factual basis’.<sup>25</sup>

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<sup>17</sup> *R v Lockyer* (1996) 89 A Crim R 457.

<sup>18</sup> This list is adapted from J Anderson et al, *The New Evidence Law* (2002) [97.80]. Other factors identified include whether the evidence goes to a critical fact in the prosecution’s case, in which case the probative value may need to be higher; when the other conduct occurred; the strength of the inference that can be drawn from that evidence as to tendency of the person to act in a particular way and the extent to which that tendency increases the likelihood that the fact in issue occurred; whether it is a civil or criminal case.

<sup>19</sup> See *Tasmania v Y* [2007] TASSC 112.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*; *Outtram v Tasmania* [2007] TASSC 98.

<sup>22</sup> See *Tasmania v Y* [2007] TASSC 112; *Chatters v R* [2005] TASSC 42.

<sup>23</sup> [2007] TASSC 112.

<sup>24</sup> It is noted that substantial and relevant similarity and substantially similar circumstances are not legislative requirements for s 97 (tendency evidence). They are requirements for coincidence evidence under s 98.

<sup>25</sup> [2007] TASSC 112, [39] per Crawford J.

*Coincidence evidence – s 98*

2.3.6 Coincidence evidence 'refers to a set of circumstances where the probative force of the evidence arises from the degree of improbability that coincidence provides as innocent explanation for the evidence'.<sup>26</sup> The *Evidence Act 2001*, s 98 sets out the coincidence rule:

- 98 (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if –
  - (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
  - (b) the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, would not have significant probative value.
- (2) For the purpose of subsection (1), 2 or more events are taken to be related events only if –
  - (a) they are substantially and relevantly similar; and
  - (b) the circumstances in which they occurred are substantially similar.

Coincidence evidence will generally be used in one of two situations: (1) to reject any innocent explanation for an event, such as an accident; or (2) where there are multiple incidents, to show that the events are so similar that it would be reasonable to assume that one person was responsible for their occurrence.

2.3.7 In Tasmania, where the Crown has argued that the evidence of multiple complainants is cross-admissible, the evidence has frequently been treated as coincidence evidence. Since the introduction of the *Evidence Act 2001*, coincidence evidence from multiple complainants was relied upon in *Outtram v Tasmania*,<sup>27</sup> *Tasmania v E*,<sup>28</sup> *Bellemore v Tasmania*,<sup>29</sup> *Tasmania v L*,<sup>30</sup> *Tasmania v B*,<sup>31</sup> *Tasmania v S*,<sup>32</sup> *Tasmania v Farmer*,<sup>33</sup> *R v S*,<sup>34</sup> and *Tasmania v H*.<sup>35</sup> Such evidence has been admitted on the basis of the improbability of similar lies, such as in *Tasmania v E*, where it was stated that:

it is the State's case that the evidence of each complainant is admissible as relevant to and supporting the credibility of the other complainants in that it is, on the basis of common sense and experience, objectively improbable that similar allegations would be independently made by those complainants unless they were true.<sup>36</sup>

In other words, where several people independently make similar allegations of sexual assault or abuse against an accused, common sense and experience would suggest that it is more likely that the

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<sup>26</sup> Australian Law Reform Commission (ALRC), *Review of the Evidence Act 1995*, Issues Paper No 28 (2004) 8.14; J Anderson et al, *The New Evidence Law* (2002) [98.10].

<sup>27</sup> [2007] TASSC 98.

<sup>28</sup> [2007] TASSC 38.

<sup>29</sup> [2006] TASSC 111.

<sup>30</sup> [2004] TASSC 86, [2006] TASSC 59.

<sup>31</sup> [2006] TASSC 110.

<sup>32</sup> [2004] TASSC 84.

<sup>33</sup> [2004] TASSC 104.

<sup>34</sup> [2005] TASSC 18.

<sup>35</sup> (Unreported, TASSC, Blow J, 11 October 2005).

<sup>36</sup> *Tasmania v E* [2007] TASSC 38 at [2]. For example, Odgers has suggested that a basis for the admission of coincidence evidence under the uniform *Evidence Acts* is that the 'striking similarities between the accounts of two or more witnesses regarding the conduct of the defendant may make it likely that the witnesses are telling the truth, in the absence of joint concoction or contamination: S Odgers, above n 2, [1.3.6880].

witnesses are telling the truth. This draws upon the approach of the common law in *Hoch*.<sup>37</sup> However, since the decision in *Y*,<sup>38</sup> it is clear that evidence of multiple complainants against a single accused should be treated as tendency evidence (that is, evidence that the accused had a tendency to behave in a certain way) rather than coincidence evidence.

2.3.8 In order for s 98 to apply, it is necessary that:

- (1) the evidence be tendered for the purpose of proving that because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind;
- (2) there are two or more related events;
- (3) that the related events are substantially and relevantly similar and the circumstances in which they occurred are substantially similar.

2.3.9 'Substantially and relevantly similar' and 'substantially similar' are not defined in the *Evidence Act 2001*.<sup>39</sup> A consideration of three Tasmanian cases indicates the types of facts that have been held to demonstrate the requirement that the events be 'substantially and relevantly similar' and that the circumstances in which they occurred were 'substantially similar'. In *Bellemore v Tasmania*,<sup>40</sup> the facts were:

- that all the alleged events occurred at the same school;
- that all complainants were boarders at the school;
- each complainant described sexual activity with the accused in the boarding house;
- all complainants described homosexual acts between the accused and themselves when they were alone with him in his room; and
- that the accused got the complainants to masturbate him.

2.3.10 In *Tasmania v B*,<sup>41</sup> the facts relied upon as establishing related events were:

- the age of each complainant;
- the sex of each complainant;
- that the acts occurred in each complainants' bedroom;
- that the accused got into each of their beds with them; that he was wearing (only) tracksuit pants;
- that he touched and rubbed their breasts;
- that he touched and rubbed their vaginas; that he inserted his finger into their vaginas;

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<sup>37</sup> (1988) 165 CLR 292.

<sup>38</sup> [2007] TASSC 112.

<sup>39</sup> Note that the ALRC has recommended changing s 98. See ALRC, *Uniform Evidence Law*, Report No 102 (2005) recommendation 11-1. This recommendation has been adopted in changes to the *Evidence Act 1995*, s 98 which provides that: '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...', as amended by the *Evidence Amendment Act 2008* (Cth).

<sup>40</sup> [2006] TASSC 111.

<sup>41</sup> [2006] TASSC 110.

- that he placed their hands on his penis;
- that he had an erect penis;
- that he tried to kiss them on the lips.

2.3.11 In *Tasmania v L*,<sup>42</sup> the facts relied upon as establishing related events were:

- the age of the complainants;
- the circumstances in which the first sexual approach occurred (in the complainant's bedroom after she had gone to bed for the night);
- that the sexual abuse occurred in the family home when their brother was home but in his room;
- the production of pornographic magazines;
- that the accused either asked the complainants to masturbate him or got them to masturbate him;
- that the accused ejaculated in front of both complainants;
- that the accused used instructive comments;
- that the accused told the complainants not to tell anyone.

2.3.12 If the evidence qualifies as coincidence evidence, it will only be admissible if it has significant probative value within the meaning of s 97. The requirement of significant probative value in s 98 (coincidence evidence) has the same meaning as the requirement for significant probative value in s 97 (tendency evidence).<sup>43</sup>

*Tendency/coincidence evidence in criminal trials – the operation of s 101*

2.3.13 In a criminal trial, even if evidence is prima facie admissible pursuant to sections 97 and 98, s 101 imposes an additional restriction on such evidence sought to be adduced by the prosecution. Section 101 provides:

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

Prosecution evidence will be excluded pursuant to this section unless the probative value of the evidence substantially outweighs its prejudicial effect for the accused. The concept of 'prejudicial effect' is not defined in the *Evidence Act 2001*. Prejudice 'includes the risk that evidence will be given

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<sup>42</sup> [2006] TASSC 59.

<sup>43</sup> See [2.3.3].

too much weight by the fact-finder (known as ‘reasoning prejudice’) or that its emotional impact may destroy the fact-finder’s objectivity (‘emotional prejudice’).<sup>44</sup>

### ***Section 101 and the relevance of the common law test (Hoch/Pfennig)***

2.3.14 The *Evidence Act 2001*, s 101 represents a departure from the previous common law position. Prior to the enactment of the *Evidence Act 2001*, the admissibility of tendency and coincidence evidence (at common law generally referred to as similar fact or propensity evidence), was governed by the common law. At common law, the High Court in *Hoch v The Queen*<sup>45</sup> adopted a ‘no rational inference test’ for the admission of such evidence:

to determine the admissibility of similar fact evidence the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.<sup>46</sup>

Accordingly, before propensity or similar fact evidence is admissible at common law there must be no rational explanation for the evidence other than the guilt of the accused. If the evidence can be explained on some other basis, such as that it has been concocted, it is not admissible. In *Hoch*, it was held that similar fact evidence is deprived of its probative value if a reasonable view of the evidence is that it is possibly concocted. The High Court reaffirmed the ‘no rational inference’ test in *Pfennig v The Queen*<sup>47</sup> and *Phillips v The Queen*.<sup>48</sup> This means that in cases of multiple charges of sexual offences involving different complainants, the common law ‘no rational inference’ test requires the court to consider whether there is a reasonable possibility that the complainants colluded and concocted their allegations or whether they were subject to some other influence that prompted them to invent their accounts in determining whether their evidence is cross-admissible.<sup>49</sup>

2.3.15 The *Evidence Act 2001*, s 101 has been interpreted as not incorporating the common law ‘no rational inference test’.<sup>50</sup> Instead, the courts have held that s 101 should be applied according to its own terms by balancing the probative value of the evidence against its prejudicial effect for the accused. In *R v Ellis*,<sup>51</sup> the New South Wales Court of Criminal Appeal held that the application of this test ‘calls for a balancing exercise which can only be conducted on the facts of each case’.<sup>52</sup> The Court further held that the common law no rational inference test does not involve a balancing of this kind, and therefore should not be applied as a general rule in relation to s 101. In Tasmania, the approach in *Ellis* was first approved in *Tasmania v S*<sup>53</sup> and has been applied in subsequent cases.<sup>54</sup>

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<sup>44</sup> J Anderson et al, *The New Evidence Law* (2002) [101.10] referring to R Pattenden, ‘The Discretionary Exclusion of Relevant Evidence in English Civil Proceedings’ (1997) 1 *International Journal of Evidence & Proof* 361. See *Pfennig v R* (1995) 182 CLR 461, 487-488 per Mason CJ, Deane and Dawson JJ, 512-513 for a discussion of the dangers of propensity evidence. There is detailed consideration of the dangers of propensity/similar fact evidence in various ALRC publications: see for example ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [3.7]-[3.24]; ALRC, *Evidence Interim Report*, Report 26 (1985) 795-800.

<sup>45</sup> (1988) 165 CLR 292.

<sup>46</sup> *Ibid*, 296 per Mason CJ, Wilson and Gaudron JJ.

<sup>47</sup> (1995) 182 CLR 461.

<sup>48</sup> (2006) 225 CLR 303.

<sup>49</sup> (1988) 165 CLR 292, 296 per Mason CJ, Wilson and Gaudron JJ.

<sup>50</sup> *R v Ellis* [2003] NSWLR 700.

<sup>51</sup> [2003] NSWCCA 319.

<sup>52</sup> *Ibid*, [95] per Spigelman CJ.

<sup>53</sup> [2004] TASSC 84.

<sup>54</sup> See *Tasmania v L* [2006] TASSC 110; *Tasmania v B* [2006] TASSC 110; *Tasmania v Y* [2007] TASSC 112.

***The relevance of concoction or other influence to sections 97, 98 and 101***

2.3.16 Concoction arises where complainants collude in the fabrication of an account. Other influence describes the situation where one complainant invents an account after becoming aware in some way of the account of another complainant. As noted above, the common law rules of evidence require courts to exclude the possibility of concoction or other influence before admitting evidence on multiple counts on a cross-admissibility basis. However, concoction or other influence will only prevent cross-admissibility if there is some factual foundation which gives rise to the reasonable possibility of concoction.<sup>55</sup> It is not sufficient if concoction is merely a fanciful possibility. Neither is it sufficient if the complainants merely know each other and have discussed the alleged offences. There must be something more,<sup>56</sup> for example, evidence of motive.<sup>57</sup> A key issue in this Issues Paper is the relevance of concoction or other influence to the *Evidence Act 2001*, ss 97, 98 and 101. It is now clear that the ‘no rational inference’ test set out in *Hoch/Pfennig* does not apply to the provisions in the *Evidence Act 2001*.<sup>58</sup> However, following the decision in *Tasmania v S*,<sup>59</sup> the possibility of concoction continues to be central to the admissibility of tendency and coincidence evidence under the *Evidence Act 2001*.

2.3.17 The New South Wales Court of Criminal Appeal stated in *R v Ellis*,<sup>60</sup> that on its proper construction, s 101 does not incorporate the *Pfennig* test. The Court based its conclusion on the words used in Part 3.6 of the *Evidence Act 1995* (NSW) which showed that Parliament had intended to lay down a set of principles to cover the field to the exclusion of the old common law principles.<sup>61</sup> It was observed that the ‘no rational explanation test’ was the test developed by the common law to determine how the probative force and prejudicial effect of similar fact evidence should be balanced against each other. At common law, it is only if there is no rational view of the evidence consistent with the innocence of the accused that one can safely conclude that the probative force of the evidence outweighs its prejudicial effect.<sup>62</sup> In reaching the conclusion that the common law test was inapplicable to the new statutory test, Spigelman CJ found the dissenting judgment of McHugh J in *Pfennig* compelling:

If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value ‘outweigh’ or ‘transcend’ the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed – at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect.<sup>63</sup>

In contrast to the common law position, the New South Wales Court of Criminal Appeal found that the new statutory test in s 101(2) clearly requires a judge to undertake a balancing exercise in determining whether the probative value of the evidence substantially outweighs its prejudicial effect for the accused.

<sup>55</sup> *Hickey v R* (2002) 136 A Crim R 151, 155 per Templeman J.

<sup>56</sup> (2002) 136 A Crim R 151, 155 per Templeman J. This was approved in Tasmania in *Tasmania v S* [2004] TASSC 84.

<sup>57</sup> For example, evidence that the complainants hated or felt antipathy towards the accused.

<sup>58</sup> See [2.3.17]-[2.3.18].

<sup>59</sup> [2004] TASSC 84.

<sup>60</sup> (2003) 58 NSWLR 700.

<sup>61</sup> *Ibid*, 716-717 per Spigelman CJ.

<sup>62</sup> *Pfennig* (1995) 182 CLR 461, 438 per Mason CJ, Deane and Gaudron JJ.

<sup>63</sup> *Ibid*, 516 per McHugh J.

2.3.18 An application of the decision in *Ellis*<sup>64</sup> (that the ‘no rational inference’ test does not apply to the provisions in the *Evidence Act 2001*) should logically mean that the principles of *Hoch* also no longer apply. This is because the principle enunciated in *Hoch* constitutes an application of the no rational inference test. The need to eliminate the possibility of concoction as set down in *Hoch* only arises because the possibility of concoction provides a rational explanation for the evidence other than the accused’s guilt. Accordingly, if the no rational inference test does not apply, then the need to exclude the possibility of concoction as the basis for a rational inference apart from the accused’s guilt should equally not apply. This argument was not considered in *Tasmania v S*.<sup>65</sup>

2.3.19 In *S*, the accused was charged with two counts of maintaining a sexual relationship, one count in relation to A and the second in relation to B. The charges were joined in a single indictment. The Crown contended that the evidence on each count was cross-admissible, either as tendency evidence or as coincidence evidence. Counsel for the accused conceded that the evidence was prima facie admissible as tendency or coincidence evidence but argued that the evidence should not be admitted because of the possibility of concoction. It was contended that the possibility of joint concoction increased the prejudicial effect and diminished the probative value of the evidence such that the test in s 101 could not be satisfied.

2.3.20 In ruling on the cross-admissibility of the evidence, Underwood CJ considered the relevance of the possibility of concoction to the probative value of evidence for the purposes of s 97 and 98 and to the balancing exercise in s 101(2). His Honour held that it was relevant to all three sections. In relation to ss 97 and 98, his Honour stated that ‘potential untruthfulness of tendency evidence is a relevant consideration when considering the probative force of evidence sought to be adduced’.<sup>66</sup> If there was a reasonable possibility of concoction, this deprived the evidence of its significant probative value.<sup>67</sup> Further, Underwood CJ held that concoction applied to the balancing of probative value and prejudicial effect required in s 101(2).

2.3.21 In relation to s 101(2), Underwood CJ adopted the comments of Simpson J in *R v OGD (No 2)*, that ‘if the Crown fails to exclude the reasonable possibility of concoction on the part of the proposed witness or witnesses, the evidence *must* be excluded’<sup>68</sup> (emphasis added). His Honour stated that this exclusion ‘arose from the expression “probative value of the evidence substantially outweighs any prejudicial effect” in s 101(2) (and similar expressions in ss 135 and 137) and not because of any general statement in *Hoch*’.<sup>69</sup> It was his view that:

The proper exercise of the balancing act that is demanded by the Act, s 101(2) requires that evidence of possibility of concoction be taken into account, and if there is a reasonable possibility of concoction, then the prejudicial effect will ordinarily outweigh the probative value of the tendency or coincidence evidence.<sup>70</sup>

Although purporting not to apply *Hoch*, this approach is in fact no different in practical terms to an application of the ‘no rational inference test’. In conducting the balancing exercise of probative value/prejudicial effect, concoction weighs so heavily in the ‘balance’ that the reality is that its existence means that there is no balancing to be undertaken. The position effectively remains the same as that rejected by the New South Wales Court of Criminal Appeal in *Ellis* and criticised by McHugh J in *Pfennig*.

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<sup>64</sup> [2003] NSWLR 700.

<sup>65</sup> [2004] TASSC 84.

<sup>66</sup> *Ibid*, [8].

<sup>67</sup> *Ibid*, citing *R v Colby* [1999] NSWCCA 261, [107] per Mason P.

<sup>68</sup> *R v OGD [No 2]* [2000] NSWCCA 404, [77] per Simpson J, (emphasis added).

<sup>69</sup> [2004] TASSC 84, [10].

<sup>70</sup> *Ibid*, [11].

2.3.22 The approach of Underwood J in *S* was accepted as correct by the Court of Criminal Appeal in *L v Tasmania*.<sup>71</sup> It has been applied in several other cases, including *Tasmania v B*<sup>72</sup> and *Tasmania v Y*.<sup>73</sup> Similarly, in *Bellemore*, the trial judge excluded the evidence of W on the basis of concoction:

[S]he could not be satisfied 'that there might not be a real risk of contamination' in respect of the evidence of W because of communications he had had with persons other than the other complainants, and that 'any probative value his evidence may have had in the context of the argument now before the court is negated by the risk of contamination'.<sup>74</sup>

The approach taken in these cases highlights the centrality of concoction to the admissibility of tendency or coincidence evidence under the *Evidence Act 2001*, ss 97, 98 and 101. While the Tasmanian courts have not readily found that concoction exists, it can be seen that the possibility of concoction, if a finding is made that there is such a reasonable possibility, weighs so heavily in the balance that it appears automatically to require the exclusion of the evidence.

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<sup>71</sup> [2006] TASSC 59.

<sup>72</sup> [2006] TASSC 110.

<sup>73</sup> [2007] TASSC 112.

<sup>74</sup> *Bellemore v Tasmania* [2006] TASSC 111, [21] per Crawford J referring to the ruling of the trial judge.

## Part 3

# The Need for Reform

3.1.1 This Part provides an overview of the Tasmanian context where an accused is charged with sexual offences in respect of more than one complainant. This will enable a Tasmanian perspective to be applied to the discussion of the literature concerning the circumstances in which trials are joined and the operation of the tendency and coincidence rules in the context of sexual offences. In considering the need for reform, it is necessary to evaluate the purpose served by the rules concerning the joinder of trials and the rules limiting the use of tendency and coincidence evidence. It is also necessary to examine the dangers posed to the accused where the evidence of multiple complainants is cross-admissible.

## 3.2 The Tasmanian context

3.2.1 Since the commencement of the *Evidence Act 2001*, there have been 17 trials identified where a single accused was charged with sexual offences against multiple complainants.<sup>75</sup> In 15 of these cases, the prosecution joined the counts against the accused in a single indictment, and in all but two of these cases, an application was made by the defence to have the counts severed and dealt with in separate trials.<sup>76</sup> While this is an apparently routine application in such cases, an examination of the cases raises the question of the possible spuriousness of applications made on the basis of concoction. The primary reason advanced by defence counsel for the severance of the counts was the possibility of concoction/contamination between the complainants. In 11 of the 13 cases, the application to sever was based wholly or in part on the possibility of concoction/contamination between the complainants. This argument was successful in only one of these cases.<sup>77</sup> In three of the 11 cases, the ruling of the trial judge not to sever a count on the basis of concoction/contamination was challenged on appeal. In all three cases, the decision at first instance was upheld.<sup>78</sup> The other major argument advanced in support of applications to sever trials (in nine cases) was that the evidence was not cross-admissible within sections 97 and 98 because there was a lack of similarity between the counts. This argument was upheld in six of the 13 cases.

3.2.2 The limited success of the concoction arguments suggests that ss 97, 98 and 101 of the *Evidence Act* and s 311 of the *Criminal Code* are working in a manner conducive to the interests of the Crown and complainants. It also indicates that judges in Tasmania do not automatically find concoction from the mere association of the complainants and that they scrutinize the evidence with care to determine whether there is a reasonable foundation for the suggestion of concoction. However, this is not the nub of the problem. The difficulty with the operation of the law in this area is that it requires complainants to testify on numerous occasions. In 12 of the 13 cases where the application to sever was made, the complainants were required to give evidence on the voir dire (in relation to the

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<sup>75</sup> See Appendix A. These case files have been accessed with the assistance of the Office of the Director of Public Prosecutions. The cases were identified by a search of the Tasinlaw sentencing database and a database used by the DPP.

<sup>76</sup> The exceptions were: *Tasmania v Coy*, sentenced 8 December 2004, Evans J, where concoction was run as the main defence strategy at trial and *E v Tasmania*, sentenced 4 June 2008, Blow J, [2008] Tas 72 where the accused was self-represented at trial and did not apply for severance.

<sup>77</sup> *Bellemore v Tasmania* [2006] TASSC 111.

<sup>78</sup> *Outtram v Tasmania* [2007] TASSC 98; *Bellemore v Tasmania* [2006] TASSC 111; *L v Tasmania* [2006] TASSC 59.

severance application), and then again at trial. Extreme examples of this occurred in the cases of the *Bellemore*<sup>79</sup> and *Ferguson*,<sup>80</sup> where some of the complainants were required to give evidence eight times.<sup>81</sup> These cases involved charges of sexual assault against two priests committed over 30 years ago. In both cases there were voir dire hearings for severance applications. In relation to *Bellemore*, there was then a trial, an appeal and two retrials. In relation to *Ferguson*, there were two trials, one of which was aborted and then a retrial. Some of the complainants gave evidence on all these occasions. The only case involving multiple charges of sexual offences where a severance application was made and the complainants were not required to give evidence on the voir dire was a case where the complainants did not know each other and therefore no issue of concoction could arise.<sup>82</sup>

3.2.3 It is not suggested that defence counsel has any ulterior motive in making severance applications. Rather, defence counsel has an obligation to serve the interests of the accused, and in cases where complainants are known to each other, applications to sever would be made almost as a matter of course. If there is a possibility of lawfully securing an advantage for their client, defence counsel should pursue that avenue and is 'not entitled to allow sympathy for a witness to inhibit the defence of his [or her] client'.<sup>83</sup> Defence counsel have a 'duty to protect her or his client so far as is possible from being convicted, except by a competent tribunal and upon admissible evidence sufficient to support a conviction for the offence with which the client is charged'.<sup>84</sup> While a severance application can be determined on the papers, it seems that the practice in Tasmania is for a voir dire to be held. And, there is general acceptance that cross-examination on the voir dire, in the absence of the jury, provides scope for defence counsel to question a complainant more aggressively than he or she might do before a jury.<sup>85</sup>

3.2.4 Not all defence counsel use the absence of the jury to cross-examine the complainant aggressively. However, as a general rule, the need to testify on multiple occasions does not serve the interests of complainants.<sup>86</sup> Cross-examination on a voir dire can be used by defence counsel as a tactical manoeuvre to assess the complainant as a witness and to lay the foundation for prior inconsistent statements. In her handbook on *Surviving the Legal System*, Taylor observes that:

The committal hearing can act as a 'fishing expedition' ... in which lawyers seek access to a range of material or ask a wide range of questions in the hope of gleaning bits of information that might be useful to discredit you at a later trial. You might be asked questions that seem innocuous, harmless or even frivolous. ... But there is a reason for this approach. Children asked about seeing their parents have a fight or their grandparents not getting on well with their father, children asked about whether they put their dressing gown on when they got out of bed, or adults asked to recall the underwear they wore on a particular night, or about the argument they had with a work colleague that day: all these details might become part of the Defence strategy at the later trial.

At the trial, you are likely to find small, apparently trivial details that you gave at the committal being used by the Defence to demonstrate inconsistencies or apparent errors in your evidence, or being raised in ways that confuse, embarrass or distress you. Unlike at the committal, your evidence during the trial could be severely restricted, and you are unlikely to have the opportunity to expand on your answers or put them in context.<sup>87</sup>

<sup>79</sup> *Bellemore v Tasmania* [2006] TASSC 111.

<sup>80</sup> Sentenced, 15 May 2007, Crawford J.

<sup>81</sup> Information provided by personal correspondence with Michael Stoddart, Office of the DPP.

<sup>82</sup> *Outtram v Tasmania* [2007] TASSC 98.

<sup>83</sup> K Crispin QC cited in J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice* (1995) 175.

<sup>84</sup> G Dalpont, *Lawyer's Professional Responsibility* (2006) [18.85].

<sup>85</sup> See C Taylor's comments in relation to cross-examination at committal, C Taylor, *Surviving the Legal System* (2004) 77.

<sup>86</sup> It has been suggested that the voir dire hearing, if held close to the trial proper, gives the complainant a chance to settle his or her nerves.

<sup>87</sup> C Taylor, above n 85, 79-80. Dr Taylor's comments are based on her PhD research ('The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court,

The same points can be made about voir dire hearings in relation to severance applications. A key technique of cross-examination at trial is to focus on inconsistencies and confusion, particularly about minor or secondary details.<sup>88</sup> At trial, defence counsel can exploit inconsistencies in previous accounts given by a complainant, such as that given when they made their initial complaint of sexual abuse to the police, the account given on the voir dire and the account given at trial. Cross-examination on the voir dire gives defence counsel an additional chance to obtain statements that can be used at trial to highlight inconsistencies in the complainant's evidence.

3.2.5 During informal conversations with prosecuting authorities, the importance of the initial police investigation has been stressed as a factor relevant to the likelihood of ultimately holding a joint trial. The need for this initial investigation to explore questions of concoction or influence with complainants has been identified as important, so that the prosecution is not 'surprised' at a later stage by allegations of concoction or influence. In addition, the need to explore the possibility of an early disclosure of the sexual abuse (prior to the report to the police) has been identified as a significant factor in countering severance applications on the basis of concoction or influence.

3.2.6 A further problem resulting from the *Hoch* concoction test is that where its application results in an order for separate trials, there is a reduced likelihood that the separate trials will proceed and that if they do, that they will result in guilty verdicts. Research in New South Wales has found that there is a greater likelihood of securing a conviction where charges are joined compared to cases where separate trials are ordered. There has been no empirical research conducted to determine whether this is also the case in Tasmania. However, anecdotally, it would seem that there is a higher attrition rate in cases where separate trials are held. Generally, if a complaint of sexual abuse is severed from other counts, it is less likely to proceed to trial and, if there is a trial, a conviction is less likely. An exception would be the recent Launceston case of *F* where the counts were severed and the accused entered a plea of guilty to two of the counts involving two complainants. A trial was held in respect of the remaining complainant and the accused was found guilty.<sup>89</sup>

3.2.7 An additional difficulty arising from the current approach in Tasmania has been identified. It is evident that every time a person tells and retells a story, the story may be told in a slightly different manner and that some of the factual details may change.<sup>90</sup> This has implications in the criminal justice context. For example, in *P v The Queen*<sup>91</sup> the issue of concoction was explored on a voir dire in relation to a severance application. At trial, the evidence of one of the complainants differed from the evidence that she had given on the voir dire in relation to discussions she had had with one of the other complainants. No new application to sever was made in the course of the trial and the accused was convicted. The accused successfully appealed and a retrial was ordered. In *Tasmania v L*,<sup>92</sup> the accused was charged with four counts alleging sexual offences against two different complainants. Prior to the commencement of the trial, an unsuccessful application to sever

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Australia, 1995'. Her thesis was awarded the 2000-2001 Jean Martin Award which is a biennial award for best PhD thesis in social sciences from an Australian University. See also C Taylor, *Court Licensed Abuse*, (2004) Chapter 7.

<sup>88</sup> See Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (2000) Chapter 8; NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Courts as Victims of Sexual Assault* (1996) 167-169; I Freckelton, 'Sexual offences prosecutions: a barrister's perspective' in P Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 145; C Taylor, above n 85, 133-140.

<sup>89</sup> See *R v F*, COPS, 21 May 2008.

<sup>90</sup> In relation to children, the ALRC and Human Rights and Equal Opportunity Commission (HREOC), *Seen and Heard: Priorities for Children in the Legal Process*, ALRC 84 (1997) [14.28] note that 'multiple interviews are potentially harmful to the child required to recount traumatic events and to the reliability of that child's evidence'.

<sup>91</sup> [2002] TASSC 61. This case was decided on the basis of the common law and not the *Evidence Act 2001*. However, the illustration of the practical difficulties that may arise applies equally to the *Evidence Act 2001*.

<sup>92</sup> [2006] TASSC 59.

was made on the basis of lack of similarity of the coincidence evidence and concoction. At trial, the evidence that was adduced differed from the evidence on the voir dire and the trial judge reconsidered the admissibility of the coincidence evidence. The trial judge ruled that the evidence was admissible and the accused unsuccessfully appealed.

### 3.3 Seeking an appropriate balance

3.3.1 An accused has a right to receive a fair trial.<sup>93</sup> The New South Wales Law Reform Commission (NSWLRC) has observed that this is more accurately expressed as 'a right not to be tried unfairly' or 'an immunity against conviction otherwise than after a fair trial'.<sup>94</sup> The concept of fairness depends on the interests of justice in the light of all the circumstances surrounding the trial. Fairness accommodates the interests of both parties – the Crown and the accused.<sup>95</sup> There is also a public interest in the administration of justice in ensuring that the accused is fairly tried. However, this does not mean 'that the interests of the accused take priority over all other interests that may be affected by the proceedings'.<sup>96</sup> As the Chief Justice of the New South Wales Court of Criminal Appeal, Spigelman CJ has observed:

An individual accused in a criminal trial is not the only person who has rights and interests deserving of respect. There is a well recognised public interest in the securing of convictions of guilty persons and the vindication of the rights of the victims of criminal conduct. The Crown prosecutes on behalf of the whole community ... The maintenance of public confidence in the administration of justice, which may be adversely affected by lack of fairness in the process of the court, may also be undermined by a failure to provide protection to the community in the conviction of guilty persons.<sup>97</sup>

The rules of joinder/severance and the cross-admissibility of evidence on the basis of tendency/coincidence evidence should aim to provide an appropriate balance between the need to provide a fair trial for the accused and the difficulties presented for prosecutors, judges, and complainants in sexual offence cases.

#### *The advantages of the joint trials*

3.3.2 There are several advantages to the joinder of trials. These include reduction of costs, the saving of time and the conservation of judicial resources.<sup>98</sup> Significantly, in the context of sexual offences trials, there is also the reduction of trauma to witnesses and the provision of relevant evidence

<sup>93</sup> This is a long-standing and fundamental right of an accused. See *Dietrich v R* (1992) 177 CLR 292. The right to a fair trial is recognised by international law, see the *International Covenant on Civil and Political Rights*, Article 14.

<sup>94</sup> New South Wales Law Reform Commission (NSWLRC), *Questioning of Complainants by Unrepresented Accused in Sexual Offences Trials*, Report 101 (2003) [3.23] referring to *Dietrich v The Queen* (1992) 177 CLR 292 and *Jago v The District Court of NSW* (1989) 168 CLR 23.

<sup>95</sup> *Ibid*, referring to *Barton v The Queen* (1980) 147 CLR 75 and *Dietrich v The Queen* (1992) 177 CLR 292. The NSWLRC's comments were also relied upon in the ACT report: see Office of the Director of Public Prosecutions (ACT) and Australia Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005) 162-163.

<sup>96</sup> NSWLRC, above n 94, [3.66].

<sup>97</sup> Spigelman CJ, 'Truth can cost too much: the principle of a fair trial' (2004) 78 *Australian Law Journal* 29, 44-45.

<sup>98</sup> Western Australia Law Reform Commission (WALRC), *Review of the Criminal and Civil Justice System*, Final Report, 1999, [26.3].

and a more complete picture of the circumstances to the jury.<sup>99</sup> In the context of child sexual abuse cases, the Australian Law Reform Commission (ALRC) and the Human Rights Commission identified two main concerns arising from the rules of severance: '(1) the undesirability of children giving evidence more than once and (2) the jury's ignorance concerning claims by other children where the credibility of a child in a trial was challenged'.<sup>100</sup> The Report recommended that:

Multiple proceedings involving ... more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence.<sup>101</sup>

3.3.3 Severance also creates problems for the prosecution in presenting its case. This is highlighted by the comments made by the NSW Director of Public Prosecutions to the NSW Standing Committee on Law and Justice, where he observed that:

Although as a matter of fairness, if there is a close relationship, opportunity and motive for concoction, the trials of various complainants should be separated, routine separation of trials of children with some connection with one another can work an injustice upon the prosecution. Where several children in a class complain of similar impropriety by a teacher and separate trials are ordered, each jury is presented with a single child out of the class of perhaps 30 and the natural assumption is that this might be the only child who has complained, as, if it were otherwise, the prosecution would have alluded to it. A quite inaccurate picture of the available evidence is thereby presented. The situation can arise when one child who has complained of being a victim but who also offers some corroborative evidence in relation to another child, must give evidence in the trial of the other child without making reference to his or her own direct experience.<sup>102</sup>

3.3.4 Similar concerns about credibility and the creation of an inaccurate picture apply to adults in sexual offences cases:

Generally, each complainant will have a separate trial and the jury in each trial will not be aware of the existence of other allegations by other complainants. The complainant in each trial is prevented from mentioning the fact that allegations have been made by others. The jury is likely to be directed in each trial that the prosecution case rests solely upon the evidence of the complainant so that the complainant's evidence is to be given the most careful scrutiny.

Further, depending upon the nature of the allegations, it may be that an order for separate trials results in a complainant having to give evidence more than once (for example, he or she might be a witness in another complainant's trial, either as a witness on general matters or as a witness of the abuse upon the other complainant) and indeed, may be prevented from mentioning that he/she was also sexually abused by the accused in the trial relating to the other complainant.<sup>103</sup>

3.3.5 The practical difficulties of securing convictions in cases involving multiple trials is highlighted by a study conducted by the Judicial Commission of New South Wales which examined child sexual assault matters determined in the District Court of New South Wales during 1994. The majority of the 201 offences where the indictment contained more than one offence against more than one victim were dealt with in one trial (158) and 'the proportion of guilty and not guilty verdicts were

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<sup>99</sup> Ibid, [26.3].

<sup>100</sup> ALRC and HREOC, above n 90, [14.87].

<sup>101</sup> Ibid, recommendation 103, 335; see also, Queensland Law Reform Commission (QLRC), *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (2000) 384.

<sup>102</sup> Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, NSW Legislative Council Parliamentary Paper No 208 (2002) [4.85].

<sup>103</sup> L Chapman, *Review of South Australian Rape and Sexual Assault Laws*, Discussion Paper (2006) [129]-[130].

quite similar'.<sup>104</sup> However, the remaining 43 offences were dealt with in separate trials, and 'the vast majority resulted in not guilty verdicts'.<sup>105</sup> There were also 'very few guilty pleas in such cases'.<sup>106</sup> This finding needs to be placed in the broader context that sexual offences convictions in themselves are relatively difficult to obtain.<sup>107</sup>

### *Sexual assault trials in context*

3.3.6 Australian research shows that convictions for sexual offences are relatively difficult to obtain. While it has been asserted that allegations of sexual abuse are difficult to refute,<sup>108</sup> the available evidence suggests that the opposite is in fact the case – sexual offences are difficult to prove. Australian research shows that of the small proportion of sexual offences that are reported to the police and then proceed to court,<sup>109</sup> convictions are more difficult to obtain than for all other offences. Australian Bureau of Statistics (ABS) data show that offenders charged with sexual assault and related offences are less likely (with the exception of homicide) to plead guilty than for other offences. In higher courts in 2006-2007, 61.1% of offenders charged with sexual assault or related offences pleaded guilty in contrast to 84.7% for other offences (excluding sexual assault and related offences).<sup>110</sup> In cases that proceeded to trial, sexual assault and related offences was usually the only offence category where an offender who went to trial was more likely to be acquitted than convicted.<sup>111</sup> In higher courts in 2006-2007, 57% of those who pleaded not guilty to a sexual offence, where a decision was finalised, were acquitted.<sup>112</sup> This is in contrast with 38% of offenders who were acquitted after pleading not guilty to other offences (excluding sexual assault and related offences).<sup>113</sup> Overall, ABS figures show that in 2006-2007, 78.1% of offenders charged with a sexual offence were convicted (either by guilty plea or guilty finding) compared with 94.4% conviction rate for other offences (excluding sexual assault and related offences).<sup>114</sup> Recent research by Bouhours and Daly, that included 'other outcomes' (such as cases that were dismissed or not proceeded with), revealed

<sup>104</sup> P Gallagher et al, *Child Sexual Assault*, Judicial Commission of New South Wales (1997) 20.

<sup>105</sup> P Gallagher, above n 104, 20.

<sup>106</sup> Ibid.

<sup>107</sup> See discussion at [3.3.6]-[3.3.9].

<sup>108</sup> The classic statement is that of Lord Hale: '[rape] is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent', Hale's *Pleas of the Crown* (vol 1, 1713).

<sup>109</sup> See for example, B Bouhours and K Daly, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, (2008) Attrition Study Technical Report (ASTR) No. 5, 50 [www.griffith.edu.au/professional-page/professor-kathleen-daly/publications](http://www.griffith.edu.au/professional-page/professor-kathleen-daly/publications) at 3 March 2009; See also J Fitzgerald, 'The attribution of sexual offences from the New South Wales criminal justice system' *Crime and Justice Bulletin no 92* (2006); and D Lievore, *Prosecution Decisions in Adult Sexual Assault Cases: An Australian Study* (2004).

<sup>110</sup> Australian Bureau of Statistics (ABS), *Criminal Courts Australia 2006-07*, ABS cat no 4513.0 (2008) 14. This is consistent with previous years, 60% cf. 84.7% (2005-06); 58% cf. 83.9% (2004-05); 62.4% cf. 86.3% (2003-04): see ABS, *Criminal Courts Australia 2005-06*, ABS cat no 4513.0 (2007) 13; ABS, *Criminal Courts Australia 2004-05*, ABS cat no 4513.0 (2006) 13; and ABS, *Criminal Courts Australia 2003-04*, ABS cat no 4513.0 (2005) 29.

<sup>111</sup> An examination of ABS statistics from 2006-2007 to 2003-2004 showed that acts intended to cause injury was the only other offence category to have a greater than 50% chance of an acquittal following a trial for the year 2004-05 (51.2%).

<sup>112</sup> ABS, *Criminal Courts Australia 2006-07*, above n 110, 11. This is consistent with previous years, 58.5% cf. 39.2% (2005-06); 57% cf. 40.6% (2004-05); 61.2% cf. 37% (2003-04): see ABS, *Criminal Courts Australia 2005-06*, above n 110, 13; ABS, *Criminal Courts Australia 2004-05*, above n 110, 13; and ABS, *Criminal Courts Australia 2003-04*, above n 110, 29. See also N Taylor, 'Judicial attitudes and biases in sexual assault cases' (2007) *Trends and Issues in Crime and Criminal Justice* no 344.

<sup>113</sup> ABS, *Criminal Courts Australia 2006-07*, above n 110, 14.

<sup>114</sup> Ibid. This is consistent with previous years, 76.5% cf. 93.5% (2005-06); 76.2% cf. 93.5% (2004-05); 77% cf. 94.9% (2003-04). See ABS, *Criminal Courts Australia 2005-06*, above n 110, 13; ABS, *Criminal Courts Australia 2004-05*, above n 110, 13; and ABS, *Criminal Courts Australia 2003-04*, above n 110, 29.

lower conviction rates for sexual offences than the ABS data:<sup>115</sup> 52% for South Australia, 49% for New South and 69% for Victoria.<sup>116</sup>

3.3.7 The difficulty in establishing guilt beyond reasonable doubt in sexual offence cases reflects the fact that sexual assaults ‘are usually committed in private, there is often little or no corroborating evidence and it is usually one person’s word against another’.<sup>117</sup> In the absence of supporting evidence, the jury must decide whether the events occurred as the complainant says they did. In cases of rape, consent may be disputed and the jury must decide whether the complainant consented or whether the defendant had an honest and reasonable but mistaken belief in consent. In the absence of supporting evidence, the jury must:

resort to making a probability judgement about consent through their assessment of the testimony given, the surrounding elements of the case, the context in which the incident occurred, the plausibility of each story, and their own impressions, knowledge and experience of people and human affairs.<sup>118</sup>

This means that the credibility of the complainant is a major factor relevant to the likelihood of obtaining a conviction.<sup>119</sup>

3.3.8 Consent is less likely to be the issue where the offence involves a child complainant. In such cases the issue is often whether the sexual offences occurred at all. Again, these are offences that usually occur in private, without witnesses, and where proof requires the child to be believed. As Hamer writes:

The vast bulk [of sexual assaults] are committed by someone known to the victim. Such cases frequently turn into a battle of credibility between the complainant and the defendant. In some cases, including many involving child complainants, the relationship between the parties may present an obstacle to prompt complaint and forensic evidence may be lost.<sup>120</sup>

In these circumstances, considerations of judgement and discretion will arise when the jury is determining whether the complainant is to be believed. The importance of the credibility of a child complainant to the verdict was shown in Cashmore and Trimboli’s recent study of juror perceptions in child sexual assault trials.<sup>121</sup> This study examined the perceptions of 277 jurors from 25 juries hearing child sexual assault trials in four District Courts in Sydney between May 2004 and December 2005. Jurors were asked questions in relation to the perceived consistency and credibility of the child complainant. It was found that consistency and credibility were significantly associated with the verdict: ‘juries which returned a guilty verdict on some or all charges rated the child complainant as significantly more consistent and more credible than those which acquitted the defendant’.<sup>122</sup>

3.3.9 The cross-admissibility of evidence (allowing the jury to take into account the evidence of one complainant in considering the charges in relation to another complainant) has a key role to play in supporting the credibility of each complainant. Aside from direct relevance to the facts in issue, it also operates as a shield against negative stereotypes that exist in relation to rape complainants and

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<sup>115</sup> Bouhours and Daly point out that the ABS data does not include cases that are dismissed or withdrawn, and consequently has inflated conviction rates: See B Bouhours and K Daly, above n 109, 17.

<sup>116</sup> Ibid, 17-19.

<sup>117</sup> N Taylor, above n 112, 1, referring to Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 95.

<sup>118</sup> Ibid, 4.

<sup>119</sup> Ibid, 1.

<sup>120</sup> D Hamer, ‘Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious’ (2007) 30 *University of New South Wales Law Journal* 609, 634.

<sup>121</sup> J Cashmore and L Trimboli, ‘Child sexual assault trials: A survey of juror perceptions’ *Contemporary Issues in Criminal Justice* no 102 (2006) 9.

<sup>122</sup> Ibid.

child witnesses. Recent Victorian research has shown that nearly one quarter of respondents disagreed with the statement that women rarely make up false claims of rape and a further 11% were unsure.<sup>123</sup> In relation to child witnesses, there exists 'centuries of disbelief and suspicion of children who accused adults of sexual crimes'.<sup>124</sup> Knowledge by the jurors of the existence of multiple complainants supports the credibility of each individual complainant.

### *The trauma of the trial*

3.3.10 The Institute adheres to the view that it is fundamentally important that an accused have a fair trial. It is also aware of the need to treat complainants in way that minimises their trauma. This is for the benefit of individual witnesses and also of the broader community. In this regard, the Institute endorses the view of the Victorian Law Reform Commission (VLRC) that:

There is a ... public interest in ensuring that child complainants are treated fairly and that they have an opportunity to tell their story without being victimised or traumatised. As well as preventing false convictions, the law must give due weight to the public interest in encouraging people to report child sexual assault to the police and in securing convictions of those who have committed offences.<sup>125</sup>

Eastwood and Patton write of 'the particularly vexatious issues of encouraging child complainants of sexual abuse into a system which further traumatises and abuses the child'.<sup>126</sup> The VLRC also made similar observations in relation to the need to protect the interests of adult complainants and to ensure that they are not subjected to unnecessary distress and embarrassment.<sup>127</sup>

3.3.11 A recurrent theme in the literature concerning sexual assault and the criminal law is the traumatising impact of the trial process on the complainant. In recent years, reforms have been implemented in Tasmania with a view to reducing the trauma of the trial for complainants, such as the availability of a support person and the ability to give evidence by audio visual link. These apply automatically to children in sexual offences cases and may be applied to adult complainants at the judge's discretion.<sup>128</sup> The impact of the reforms on the experiences of complainants has not been evaluated in Tasmania. However, research has been undertaken in other jurisdictions. The VLRC observed that:

Research shows that many complainants in sexual offence cases find their experience of the criminal justice system acutely distressing. Despite reforms over the past decade, the Commission's research and consultations show that many complainants are still very dissatisfied with the criminal justice process.<sup>129</sup>

In relation to children, a study that examined the experiences of child complainants of sexual abuse in the criminal justice system found that children were also dissatisfied with the criminal justice process.

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<sup>123</sup> N Taylor and J Mouzos, *Community Attitudes to Violence Against Women Survey 2006: Full Technical Report* (2006) referred to by N Taylor, above n 112, 5.

<sup>124</sup> L Kelly, 'Remembering the point: A feminist perspective on children's evidence' in W Westcott et al (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2002) 364. See also J Cashmore and K Bussey, 'Judicial perceptions of child witness competence' (1996) 20 *Law and Human Behaviour* 313; J Cashmore and L Trimboli, above n 121; and C Schmidt and J Brigham, 'Juror perceptions of child victim-witnesses in a simulated sexual abuse trial' (1996) 20 *Law and Human Behaviour* 581.

<sup>125</sup> Victorian Law Reform Commission (VLRC), *Sexual Offences: Final Report* (2004) [5.7].

<sup>126</sup> C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, (2002) Report to the Criminology Research Council, Canberra, 4 <<http://www.aic.gov.au/crc/reports/eastwood.html>> at 2 March 2009.

<sup>127</sup> VLRC, above n 125, [4.2].

<sup>128</sup> See, *Evidence (Children and Special Witnesses) Act 2001* (Tas).

<sup>129</sup> VLRC, above n 125, [1.12].

The study asked if they would ever report sexual abuse again following their experiences in the criminal justice system, and only 44% of children in Queensland, 33% in New South Wales and 64% in Western Australia indicated that they would.<sup>130</sup> The study also examined the attitude of legal participants (Crown prosecutors, defence counsel and the judiciary) where only 33% indicated that they would want their own child in the justice system if the child was a victim of serious sexual abuse. No defence lawyer said they would want their child in the court system.<sup>131</sup>

3.3.12 One of the aspects of the court process that continues to cause distress is cross-examination. While most witnesses find cross-examination to be a stressful experience, the difficulties are compounded in sexual offence cases by the nature of the offence and the intimate nature of details that the witnesses are required to divulge. The NSWLRC has identified three distinctive features of sexual offence cases that make trials particularly distressing for complainants:

- the nature of the crime;
- the role of consent with its focus on the credibility of the complainant;
- the likelihood that the accused and the complainant knew each other before the alleged assault occurred.<sup>132</sup>

All these features contribute to the distressing nature of cross-examination. These problems are likely to be heightened for child complainants. Cross-examination has been identified as one of the most damaging parts of the criminal justice system for children.<sup>133</sup> In their study, Eastwood and Patton found that ‘the overwhelming area of concern for all children was the experience of cross-examination and the attitudes and behaviour of defence counsel’.<sup>134</sup> Eastwood notes that ‘in recognition of the problem of repeated cross-examination, both the ALRC and HREOC and the Standing Committee on Law and Justice recommend the child give evidence on no more than one occasion’.<sup>135</sup>

3.3.13 In recognition of the distress, embarrassment and humiliation that may be caused to complainants by the process of testifying, legislation offers some protection by limiting counsel’s ability to ask questions about prior sexual experience and preventing questions about sexual reputation.<sup>136</sup> There are also restrictions placed on the ability of defence counsel to ask ‘unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’ questions in cross-examination.<sup>137</sup> A recognition of the trauma caused to complainants in sexual offence cases by cross-examination is also reflected in the restriction that limits the ability of the accused to question a complainant in preliminary proceedings to ‘exceptional circumstances’.<sup>138</sup> A preliminary proceeding is the equivalent of a committal hearing in the Magistrates’ Court where an accused can apply for an

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<sup>130</sup> C Eastwood and W Patton, above n 126, 1. The greater satisfaction with the criminal justice system in Western Australia was attributed to the reforms for child complainants, such as: giving evidence by CCTV; the provision of a support person; the admissibility of certain out of court statements; the pre-recording of evidence; children not required to give evidence at committal hearings. See also C Eastwood, ‘The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System’ (2003) *Trends and Issues in Crime and Criminal Justice* No 250.

<sup>131</sup> C Eastwood and W Patton, above n 126, 2.

<sup>132</sup> NSWLRC, above n 94, [2.2].

<sup>133</sup> C Eastwood and W Patton, above n 126, 4.

<sup>134</sup> Ibid, 59. See also ALRC and HREOC, above n 90, [14.110].

<sup>135</sup> C Eastwood, above n 130, 5.

<sup>136</sup> *Evidence Act 2001* (Tas), s 194M. For a review of the operation of the forerunner to this provisions, that is *Evidence Act 1910* (Tas) s 102A, see T Henning, *Sexual Reputation and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences*, Occasional Paper No 4 (1996).

<sup>137</sup> *Evidence Act 2001* (Tas), s 41.

<sup>138</sup> See *Criminal Code* 1924, s 331B and *Justices Act 1959* (Tas) s 3(1) definition of ‘affected person’.

order that named witnesses give evidence on oath.<sup>139</sup> Reforms to the committal process were (in part) motivated by a desire to lessen the trauma to the complainant by reducing the number of times a complainant is required to give evidence.<sup>140</sup> There is also general acceptance that cross-examination in the absence of the jury provides more scope to defence counsel to question a complainant more aggressively.<sup>141</sup> Such reforms may be seen to be undermined, in cases where there are multiple complainants, if complainants are being routinely cross-examined on the voir dire as well as at the trial.

### *Dangers of joint trials*

3.3.14 The fundamental concern with the joinder of charges in sexual offences cases involving multiple complainants is the possibility of an unfair trial and the erosion of the presumption of innocence.<sup>142</sup> The rationale for the restriction on the joinder of charges is 'the fundamental principle that evidence on the commission of offences other than the offence charged is generally inadmissible against the defendant at a criminal trial'.<sup>143</sup> The VLRC expressed the concern in the following way:

The 'presumption of innocence' is a fundamental principle of criminal law. It requires the jury to start on the basis that the accused is innocent of the particular offence that they are considering. It then requires the jury to examine the evidence that they have heard on that count, and to reach a conclusion based on that evidence. It is wrong for the jury to find the accused person guilty of a particular offence if the finding is not based on the evidence relating to that count, but upon considerations, such as a suspicion that the accused is the sort of person who is likely to commit a sexual offence.

Where a person is charged with separate sexual offences against several complainants there is a risk that, if the same jury hears all of the counts, it might use evidence relating to an offence charged in one count to decide that the person has also committed a different offence, even though there may be insufficient evidence to support a conviction for the second offence. The jury may not properly examine the evidence relating to the second offence, but may simply conclude that the accused is guilty of the second offence because he is the sort of person who is likely to have committed such an offence.<sup>144</sup>

Psychological research demonstrates the dangers of admitting character evidence in the criminal process.<sup>145</sup> Aside from the dangers of unfairness to the accused, there is also the difficulty for the jury in dealing with the large amount of evidence in relation to multiple charges.<sup>146</sup>

<sup>139</sup> In 2008, as part of a streamlining of criminal procedure for indictable offences to be heard in the Supreme Court, the 'committal hearing' is now part of the Supreme Court procedure where the accused's first hearing is in the nature of a directions hearing, that includes the power for the accused to apply for an order that witnesses give evidence on oath in preliminary proceedings: see, *Criminal Code* 1924 (Tas), s 331B.

<sup>140</sup> See Tasmania, *Hansard*, House of Assembly, Wednesday 28 March 2001, Pt 2, 33-106 (Dr Peter Patmore, Minister for Justice and Industrial Relations); Tasmania, *Hansard*, House of Assembly, Tuesday 9 May 1995, Pt 2, 51-88 (Mr Cornish, Minister for Justice). See also observations about the need to abolish committals in Queensland and New South Wales contained in C Eastwood and W Patton, above n 126; The ALRC and HREOC, above n 90, [14.97]-[14.88], recommendation 103, and the Standing Committee on Law and Justice, above n 102, [4.82], identified the difficulties where a child is required to give evidence on more than one occasion.

<sup>141</sup> See for example, Office of the Director of Public Prosecutions (ACT) and Australia Federal Police, above n 95, 120; ALRC and HREOC, above n 90, [14.49]; VLRC, above n 125, [3.41].

<sup>142</sup> WALRC, above n 98, [26.3], [26.4].

<sup>143</sup> *Ibid*, [26.4]. See discussion at [3.3.1].

<sup>144</sup> VLRC, *Sexual Offences – Law and Procedure*, Discussion Paper (2001) [8.51].

<sup>145</sup> See ALRC, above n 39, [3.9]-[3.25].

<sup>146</sup> J Gans, 'Similar facts after Phillips' (2006) 30 *Criminal Law Journal* 224, 226.

### *The dangers of tendency/coincidence evidence*

3.3.15 Restrictions on the admissibility of tendency and coincidence evidence reflect the long acknowledged dangers of propensity and similar fact evidence. There is a long held view that ‘people are likely to overrate the value of similar fact evidence and be influenced improperly by it’.<sup>147</sup> The ALRC provided an overview of the psychological research that supports the approach taken by the criminal law in relation to tendency and coincidence evidence. In summary, the research shows that:

- behaviour tends to be highly dependent on situational factors and not, as previously postulated, on personality traits. Thus, the ability to predict behaviour from past behaviour depends on the similarity of the situations (‘low cross-situational consistency of behaviour’);
- people tend to attribute the behaviour of others to enduring personality traits and underestimate the role of situational factors in determining behaviour in any given situation (‘fundamental attribution error’);
- people tend to infer, from limited knowledge of a person, general personality traits which thereafter colour their perception of that person’s behaviour (‘the halo and reverse halo effects’);
- jurors will be less reluctant to acquit an accused if they are informed of an accused’s previous misconduct and/or convictions, because they feel either that the gravity of their decision is lessened or that there is some basis for punishment, even if they are not convinced the accused committed the crime charged (‘the regret matrix’).<sup>148</sup>

3.3.16 The cross-admissibility of evidence of several complainants as tendency/coincidence evidence gives rise to the similar potential dangers as a joint trial, for example, undue suspicion against the accused and undermining the presumption of innocence. Jurors may assume that past behaviour is an accurate guide to contemporary conduct, and knowledge of other misconduct may cause the jury to be biased against the accused.<sup>149</sup> In regard to some offences, such as sexual offences committed against children, the nature of the offence is said to heighten the potential for prejudice to be caused to the accused by admitting propensity evidence.<sup>150</sup>

#### Questions

1. Are the rules relating to joinder and/or the cross-admissibility of evidence in sexual offences cases involving multiple complainants satisfactory?
2. Do you think that the current legal position creates difficulties for complainants?
3. Do you think that the current position in Tasmania strikes an appropriate balance between the interests of the accused receiving a fair trial compared to the interests of the community and the need to protect complainants from unnecessary trauma?

<sup>147</sup> ALRC, above n 26, [8.2].

<sup>148</sup> ALRC, *Uniform Evidence Law*, above n 39, [3.14]. See also VLRC, *Jury Directions*, Consultation Paper (2008) [3.102].

<sup>149</sup> This list is taken from Criminal Justice Sexual Offences Taskforce, above n 13, 74.

<sup>150</sup> See C Williams and S Draganich, ‘Admissibility of propensity evidence in paedophilia cases’ (2006) 11 *Deakin Law Review* 1. This was cited in the VLRC, above n 148, [3.102].

## Part 4

# Approaches in Other Jurisdictions

4.1.1 In Australian and overseas jurisdictions, the admissibility of tendency and coincidence evidence and the specific issue of separate trials of multiple complaints have been specifically addressed. It is possible to identify three main approaches:

- (1) the possibility of concoction is relevant to the admissibility of evidence. This is the position under the uniform *Evidence Acts* (New South Wales, Tasmania, ACT).<sup>151</sup> It is also the position in the Northern Territory where the common law position in *Hoch/Pfennig* applies. This is the position that applies in Canada and New Zealand.
- (2) the possibility of concoction is a matter for the jury to assess in determining the weight to be attached to the evidence of a complainant. This is the position in Victoria, Western Australia and Queensland. It is also the position in United Kingdom.
- (3) similar fact evidence is prima facie admissible for sexual assault trials. This is the approach under the *Federal Evidence Rules* and in some states of the United States.

4.1.2 An overview of the current position in other Australian jurisdictions and comparable overseas jurisdictions is provided in the table below. The table provides a summary of the Tasmanian position to enable a comparison to be made with other jurisdictions. A more detailed consideration of the various approaches to the trial of sexual offences involving multiple complainants follows.

	Separate Trials	Test for Tendency/Coincidence Evidence	Relevance of Concoction
Tas	<i>Criminal Code</i> , s 326(3): D embarrassed or prejudiced in defence or some other reason.	<i>Evidence Act 2001</i> , ss 97, 98 and 101 (uniform <i>Evidence Act</i> ): significant probative value & probative value substantially outweigh prejudicial effect.	Must be eliminated – relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform <i>Evidence Act's</i> tests.
NSW	<i>Criminal Procedure Act 1984</i> (NSW), s 21(2): D embarrassed or prejudiced in defence or some other reason.	<i>Evidence Act 1995</i> , ss 97, 98 and 101 (uniform <i>Evidence Act</i> ): significant probative value & probative value substantially outweigh prejudicial effect.	Must be eliminated – relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform <i>Evidence Act's</i> tests.

<sup>151</sup> Victoria has adopted the uniform *Evidence Act* with the enactment of the *Evidence Act 2008*. Part 1 and the Dictionary have commenced. The remainder of the Act has yet to commence.

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<b>ACT</b>	<i>Crimes Act 1900</i> (ACT), s 264: embarrassed or prejudiced in defence or some other reason.	<i>Evidence Act 1995</i> , ss 97, 98 and 101 (uniform <i>Evidence Act</i> ): significant probative value & probative value substantially outweigh prejudicial effect.	Must be eliminated – relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform <i>Evidence Act's</i> tests.
<b>NT</b>	<i>Criminal Code</i> (NT), s 341: embarrassed or prejudiced in defence or some other reason.	Common law ( <i>Hoch/Pfennig</i> ): no rational view consistent with innocence.	Must be eliminated – common law ( <i>Hoch</i> ): Possibility of concoction relevant to admissibility of similar fact/propensity evidence.
<b>SA</b>	<i>Criminal Law Consolidation Act 1935</i> (SA), s 278(2a): presumption of joint trial for sexual offences which may be rebutted if evidence not cross-admissible; not consider concoction or collusion	<i>Criminal Law Consolidation Act 1935</i> (SA), s 278(2a)	Not a precondition to admissibility - <i>Criminal Law Consolidation Act 1935</i> (SA), s 278(2a)(c)(ii)
<b>Vic</b>	<i>Crimes Act 1958</i> , s 372(3AA): presumption that two or more counts charging sexual offences triable together & presumption not rebutted merely because evidence on one count inadmissible on another count. <sup>152</sup>	<i>Crimes Act 1958</i> , s 398A: interest of justice. <sup>153</sup>	Not a precondition to admissibility – <i>Crimes Act 1958</i> , s 398A: the possibility of concoction is relevant to weight not admissibility of propensity evidence. <sup>154</sup>
<b>Qld</b>	<i>Criminal Code</i> (Qld), s 567, 597A(1AA): not consider collusion or suggestion.	Common law ( <i>Hoch/Pfennig</i> ): no rational view consistent with innocence.	Not a precondition to admissibility – <i>Evidence Act</i> , s 132A: alters common law so possibility of concoction is relevant to weight not admissibility of similar fact evidence.
<b>WA</b>	<i>Criminal Procedure Act 2004</i> (WA), s 133: not consider collusion or suggestion.	<i>Evidence Act 1906</i> (WA), s 31A: significant probative value and fair-minded person think public interest priority over risk of unfair trial.	Not a precondition to admissibility – <i>Evidence Act 1906</i> , s 31A: possibility of concoction is not relevant to assess probative value.

<sup>152</sup> The *Criminal Procedure Act 2009* (Vic) repeals the *Crimes Act 1958* (Vic), s 372. The *Criminal Procedure Act 2009* (Vic), s 194 creates a similar presumption that charges for sexual offences that are contained in the same indictment will be tried together. The presumption is not rebutted because evidence on one charge is inadmissible on another charge. The relevant sections of the *Criminal Procedure Act 2009* (Vic) have not yet commenced.

<sup>153</sup> The *Evidence Act 2008* adopts the uniform *Evidence Act*, so that the rules of tendency and coincidence evidence contained in ss 97, 98 and 101 will apply. This means that the test for admissibility is whether the evidence has significant probative value and that the probative value of the evidence substantially outweighs its prejudicial effect. Sections 97-101 have not yet commenced.

<sup>154</sup> While the *Criminal Procedure Act 2009* repeals many sections of the *Crimes Act 1958*, s 398A is not repealed. The Explanatory Memorandum to the *Evidence Act 2008* (Vic) foreshadows a further Bill to repeal relevant parts of the *Evidence Act 1958* the subject matter of which is addressed in the Act and to make other relevant amendments. The VLRC has recommended the repeal of s 398A following the commencement of the *Evidence Act 2008* (Vic), *Implementing the Uniform Evidence Act Report*, 2006, recommendation 44.

UK	<i>Indictment Act 1915</i> , s 5(3): embarrassed or prejudiced in defence or some other reason.	<i>Criminal Justice Act 2003</i> , s 101(1): relevant to an important matter in issue. This is a matter of substantial importance to the context of the case as a whole, s 112.	Not a precondition to admissibility – <i>Criminal Justice Act 2003</i> , s 109: possibility of concoction is usually not relevant to the assessment of the relevance or probative value of evidence of bad character (which includes propensity evidence). It is only relevant where no court or jury could reasonably find it to be true. Section 107(1)(b): court may stop case where evidence of bad character has been adduced, where contamination is such that, considering the importance of evidence in the case, the conviction would be unsafe.
New Zealand	<i>Crimes Act 1961</i> , s 340(3): conducive to ends of justice.	<i>Evidence Act 2006</i> , s 43(1): probative value in relation to issue in dispute which outweighs unfair prejudice. <sup>155</sup>	Unclear whether must be eliminated – <i>Evidence Act 2006</i> , s 43(3)(e): collusion or suggestion is relevant to the probative value of propensity evidence.
Canada	<i>Criminal Code</i> , s 591(3): interests of justice.	Common law ( <i>R v Handy</i> ): probative value outweighs prejudicial effect.	Must be eliminated – common law ( <i>R v Handy</i> ): possibility of concoction relevant to admissibility of similar fact/propensity evidence

## 4.2 (1) Relevant to admissibility of evidence

4.2.1 In Tasmania,<sup>156</sup> New South Wales<sup>157</sup> and the Australian Capital Territory (uniform evidence law) and the Northern Territory (common law),<sup>158</sup> if there is evidence which suggests that, as a reasonable possibility the evidence is concocted, that evidence will not be admissible as it will not have the necessary probative value. In turn, the cross-admissibility of the evidence of multiple complainants as tendency/coincidence evidence is a key issue in determining the severance of counts, that is, whether single or multiple trials will be held. If the evidence is not cross-admissible (due to the possibility of concoction), then it is the usual practice that the counts will be severed and multiple trials will be held.

<sup>155</sup> This provision commenced on 1 August 2007. Until recently, there was some uncertainty as to whether (1) this was merely a restatement of the former similar fact rule, or (2) whether it was a fresh start allowing in all evidence as to propensity provided its probative value outweighs the risk of unfair prejudice: see, New Zealand Law Reform Commission (NZLRC), *Disclosure to Court of Defendants’ Previous Convictions, Similar Offending, and Bad Character*, Final Report 103 (2008) 4. The Commission noted that the position is now settled below the Supreme Court level following the decision in *R v H* [2007] 3 NZLR 850, where it was held that the second approach was the correct approach: evidence of propensity is admissible provided its probative value outweighs the risk of unfair prejudice.

<sup>156</sup> See discussion at [2.3.16] ff.

<sup>157</sup> See *AE v The Queen* [2008] NSWCCA 52.

<sup>158</sup> See discussion of common law at [2.3.14].

4.2.2 This is also the position in Canada, where similar fact evidence is presumptively inadmissible. The onus is on the prosecution to establish that the probative value of the evidence outweighs its prejudicial effect.<sup>159</sup> In applying this test, the possibility of concoction is relevant to the trial judge's determination:

An important element of the probative weight analysis is the issue of potential *collusion* ... I agree with the respondent that it was part of the trial judge's "gatekeeper" function to consider this issue because collusion, if established to the satisfaction of the trial judge on the balance of probabilities, would be destructive of the very basis on which the similar fact evidence was sought to be admitted, namely the improbability that two women would independently concoct stories with so many (as the Crown contends) similar features.<sup>160</sup>

In other words, the possibility of collusion is an important factor in determining the probative value of the evidence. If there is 'evidence of *actual* collusion or at least where there is an air of reality to an allegation of collusion, the onus is on P to satisfy the trial judge, on a balance of probabilities, that the evidence of similar acts is *not* tainted with collusion'.<sup>161</sup> However, if there is evidence that amounts to no more than opportunity, the issue of concoction is left for the jury.<sup>162</sup>

4.2.3 In New Zealand, under the *Evidence Act 2006*, s 43 provides that the prosecution can only offer propensity evidence about a defendant 'if the evidence has a probative value in relation to an issue in dispute in the proceedings which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant'. Section 43(3) sets out a non-exhaustive list of matters that the trial judge may consider in assessing the probative value which includes whether the allegations may be the result of collusion or suggestibility. This means that concoction is a threshold matter relevant to the admissibility of propensity evidence. However, it is not clear how concoction will weigh in the balance of factors given that New Zealand did not have the *Hoch/Pfennig* common law tradition. Under the common law, New Zealand had followed the United Kingdom approach that concoction was not relevant to the admissibility of propensity evidence. Rather, it was a matter for the jury in determining the weight to attach to evidence.<sup>163</sup> In *R v Wyatt*, it was recognised that under the *Evidence Act 2006*, s 43(3) concoction weighs in the mix of factors:

section 43(3)(e) allows the Judge to take into account the fact that the complainant's allegations "may be the result of collusion or suggestibility". That suggests that if there is evidence of collusion or suggestibility on the face of the record, that is a matter that can be put into the mix along with other matters.<sup>164</sup>

However, 'weighing in the mix' is different from the 'knock-out' role that concoction or other influence plays in the Tasmanian context. In addition, the procedure to determine the admissibility of propensity evidence appears to differ in New Zealand. In Tasmania, in determining applications for separate trials and the cross-admissibility of evidence, the practice is to hold a voir dire to determine the question of concoction. In New Zealand, questions of propensity evidence (such as concoction or suggestibility) arising at a preliminary stage when a judge is considering the admissibility of evidence are determined on the papers. This means that the judge makes a decision without seeing or hearing the witnesses.<sup>165</sup>

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<sup>159</sup> *R v Handy* [2002] 2 SCR 908.

<sup>160</sup> *Ibid*, [99] per Binnie J.

<sup>161</sup> D Watt, *Watt's Manual of Criminal Evidence*, §34.01.

<sup>162</sup> *R v Handy* [2002] 2 SCR 908 at [111] per Binnie J.

<sup>163</sup> See Robertson, *Adams on Criminal Law* (4<sup>th</sup> student edition, 2005) 807 referring to *R v S* 22/9/95, CA201/95 adopting the House of Lords view in *R v H* [1995] 2 WLR 737.

<sup>164</sup> [2007] NZCA 436, [23].

<sup>165</sup> NZLRC, above n 155, [3.89].

## 4.3 (2) Alteration of tendency/coincidence rules so that concoction is not relevant to admissibility

4.3.1 In Australia, the common law position in *Pfennig* and *Hoch* has been modified by legislation in South Australia, Victoria, Western Australia and Queensland. In these jurisdictions, legislation provides that matters of collusion or concoction are not to be taken into account by the judge in determining the probative value of tendency or coincidence evidence. Rather, the possibility of collusion or concoction is a matter for the jury to determine. Its existence will therefore affect the weight of a complainant's evidence. There have also been legislative changes to the rules that govern the joinder of trials in South Australia, Western Australia and Queensland to reinforce the position that concoction is not relevant to the admissibility of similar fact evidence. Legislation in Victoria goes even further to create a presumption of joint trials in cases of sexual assault, even if evidence is not cross-admissible.

4.3.2 Similarly, the approach in the United Kingdom to the issue of similar fact evidence provides a statutory model that sets out that matters of collusion or concoction are usually matters for the jury to determine. It is only exceptionally a matter for the trial judge to determine and is limited to cases where no court or jury could reasonably find the complainant's evidence to be true.<sup>166</sup>

4.3.3 In addition, in these jurisdictions, different approaches have been developed to regulate the admissibility of tendency/coincidence evidence. Changes have been made to move further away from the common law approach. In Victoria, the common law test in *Pfennig/Hoch* is replaced by a 'just to admit' test.<sup>167</sup> A similar approach, based on the 'interest of justice', is provided by the Western Australian model where the admissibility of propensity evidence is governed by the *Evidence Act 1906*, s 31A(2).<sup>168</sup> In the United Kingdom, under the *Criminal Justice Act 2003*, s 101(3) evidence of propensity must be excluded '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 proceedings that the court ought not to admit it'.<sup>169</sup>

### Victoria

4.3.4 In 1995, the Drugs and Crime Prevention Committee was concerned that 'when several children make separate sexual offence allegations against the same person, those allegations are commonly heard in separate trials'.<sup>170</sup> The Committee recommended that there should be a presumption that multiple allegations of sexual offences be heard together. In 1997, the law was changed to reflect this recommendation, as well as to alter the common law propensity rules.

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<sup>166</sup> *Criminal Justice Act 2003*, s 109.

<sup>167</sup> *Crimes Act 1958* (Vic), s 398A. See [4.3.5] ff.

<sup>168</sup> The *Evidence Act 1906*, s 31A provides that propensity evidence is admissible if it has significant probative value and 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'.

<sup>169</sup> See [4.3.22] ff. See also J Spencer, *Evidence of Bad Character* (2006); Roberts and Zuckerman, *Criminal Evidence* (2004); and A Ashworth, 'Bad Character: Multiple Complainants – Prosecution contending each complainant's evidence being mutually supportive' [2007] *Crim LR* 380 for further discussion of the UK legislation.

<sup>170</sup> VLRC, above n 144, [8.44] referring to Crime Prevention Committee, *Combating Child Sexual Assault, An Integrated Model* 1995, 176-8. These recommendations were endorsed by the Rape Law Reform Evaluation Project, *An Evaluation Report: The Crimes (Rape) Act 1991* (1996) 252.

*Admissibility of propensity evidence*

4.3.5 The *Crimes Act 1958* (Vic) alters the common law and makes provision for the admissibility of propensity evidence. Section 398A provides:

**398A. Admissibility of propensity evidence**

- (1) This section applies to proceedings for an indictable or summary offence.
- (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
- (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
- (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
- (5) This section has effect despite any rule of law to the contrary.

4.3.6 The key features of section 398A are that:

- (a) The common law test ('no rational explanation') is replaced by a 'just to admit' test.<sup>171</sup> The 'just to admit test' requires the judge to balance the probative force of the evidence against its prejudicial effect.<sup>172</sup> This reflects the English approach set out by the House of Lords in *Director of Public Prosecutions v P*.<sup>173</sup>
- (b) The *Hoch* test (according to which the possibility of concoction provides a reasonable explanation consistent with innocence) no longer applies to the admissibility of propensity evidence.
- (c) The possibility of concoction is a matter for the jury to determine when assessing the weight to be attached to the evidence.

This is a major shift from the common law set out in *Hoch/Pfennig* as questions of collusion are now not part of a threshold question of admissibility, but rather are a matter for the jury to consider in assessing the weight to be attached to evidence. It 'adopts the English test of admissibility for all propensity evidence and questions of collusion and unconscious influence are now left to the jury'.<sup>174</sup>

4.3.7 The VLRC reviewed the operation of the *Crimes Act 1958* (Vic) s 398A as part of its consideration of sexual offences, and found that 'the approach taken by the Court of Appeal appears to indicate that as long as there is sufficient similarity between the various counts, propensity evidence that may not previously have been admissible is now being admitted'.<sup>175</sup>

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<sup>171</sup> *R v Best* (1998) 102 A Crim R 56. See Judicial Officers Information Manual, [20.11.10] <<http://www.justice.vic.gov.au/emanuals/SAM/default.htm>> at 22 May 2007.

<sup>172</sup> See *R v Best* [1998] 4 VR 603; *R v Tektonopoulos* [1999] 2 VR 412.

<sup>173</sup> [1991] 2 AC 447. For further consideration of the UK position, see [4.3.22] ff. It should be noted that the common law principles in the UK have been replaced by the *Criminal Justice Act 2003*.

<sup>174</sup> *R v Best* [1998] 4 VR 603, 64 per Callaway J.

<sup>175</sup> VLRC, above n 125, 4.169. However, the Explanatory Memorandum to the *Evidence Act 2008* (Vic) foreshadows a further Bill to repeal relevant parts of the *Evidence Act 1958* the subject matter of which is addressed in the Act and to make other relevant amendments. The VLRC has recommended the repeal of s398A following the commencement of the *Evidence Act 2008* (Vic), *Implementing the Uniform Evidence Act Report*, 2006, recommendation 44.

### *Joint trials*

4.3.8 The *Crimes Act 1958* (Vic) creates a presumption of joint trials in cases of sexual abuse even if evidence is not cross-admissible. While an accused can apply for a separate trial,<sup>176</sup> an exception applies for sexual offences contained in *Crimes Act 1958* (Vic) s 372(3AA)-(3AB):

(3AA) Despite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.

(3AB) The presumption created by sub-section (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.<sup>177</sup>

...

The section creates a presumption that multiple allegations should be heard together, and that the presumption is not rebutted only because the evidence that can be considered by the jury on one count cannot be taken into account for another count.<sup>178</sup> However, the cross-admissibility of evidence remains a powerful consideration in the exercise of the court's discretion to order a separate trial.<sup>179</sup>

### ***Western Australia***

4.3.9 Following an earlier review of the criminal justice system by the Western Australian Law Reform Commission (WALRC),<sup>180</sup> key changes were made in relation to the joinder of trials and the admissibility of propensity evidence by amendments to the *Evidence Act 1906* (WA) and by the introduction of the *Criminal Law Procedure Act 2004* (WA).

### *Admissibility of propensity evidence*

4.3.10 The rules governing the admissibility of propensity evidence contained in the *Evidence Act 1906*, s 31A(3) are aimed at abrogating the decision in *Hoch*:

(3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

Section 31A(2) provides that propensity evidence is admissible if it has 'significant probative value' and 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'. This mirrors the comments of McHugh J in *Pfennig*

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<sup>176</sup> *Crimes Act 1958* (Vic), s 372(3).

<sup>177</sup> As noted at fn 152, the *Criminal Procedure Act 2009* repeals the *Crimes Act 1958*, s 372 and s 194 creates a similar presumption that charges for sexual offences that are contained in the same indictment will be tried together. The presumption is not rebutted because evidence on one charge is inadmissible on another charge. The relevant sections have not yet commenced.

<sup>178</sup> See discussion in *R v KRA* [1999] 2 VR 708, 713.

<sup>179</sup> See Judicial Officers Information Manual, <<http://www.justice.vic.gov.au/emanuals/SAM/default.htm>> at 22 May 2007, referring to *R v Papamitrou* (2004) 7 VR 375; *R v Buckley* (2004) 10 VR 215.

<sup>180</sup> WALRC, above n 98, Ch 26. Recommendation 272 provided 'in considering potential prejudice, embarrassment or other reason for ordering separate trials under provisions relating to joinder of alleged offences of a sexual nature, the court should not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion'.

*v The Queen*.<sup>181</sup> In determining the probative value of evidence, the trial judge is to assume that the evidence is true. Questions of collusion, concoction or suggestion are matters for the jury when assessing the weight to attach to evidence.

### *Joint trials*

4.3.11 The *Criminal Law Procedure Act 2004* replaces the provisions in the *Criminal Code* (WA) that set out the rules for the joinder/severance of trial.<sup>182</sup> Section 133(3) provides that a court may order separate trials if the accused is likely to be prejudiced in the trial. This discretion is limited by sub-s (6):

In considering, for the purposes of this section, the likelihood of an accused being prejudiced in the trial by a jury of an indictment that contains 2 or more charges of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

This abrogates the operation of the *Hoch* principle as it applies to the joinder of trials in sexual offence cases. An aim of the legislation is to ensure that a jury does not decide a case in a vacuum, unaware that the accused has also been charged with offences against other complainants.<sup>183</sup>

## **Queensland**

4.3.12 In Queensland, the common law position has been altered by legislation that sets out the relevance of concoction to the issue of joint trials and to the admissibility of propensity and similar fact evidence. Following the 1996 *Report of the Criminal Code Advisory Working Group to the Attorney-General*, the *Criminal Law Amendment Act 1997* (Qld) inserted s 132A into the *Evidence Act 1977* (Qld), and s 597A(1AA) into the *Criminal Code* (Qld).<sup>184</sup> These provisions were intended to overcome the effect of the decision in *Hoch*.

### *Admissibility of propensity evidence*

4.3.13 In Queensland, the effect of the decision in *Hoch* concerning the relevance of concoction to the admissibility of evidence has been abrogated by section 132A of the *Evidence Act* (Qld):

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

132A. In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potential prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

4.3.14 Two possible interpretations of this section have been suggested. The first is that concoction is solely a matter for the jury. This means that the trial judge determines the admissibility of similar

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<sup>181</sup> (1995) 182 CLR 461, 529.

<sup>182</sup> This reform took effect from 2 May 2005.

<sup>183</sup> Mr J A McGinty, Tasmania, *Hansard*, Legislative Assembly, 30 June 2004, 4601c-4610a/1 (Attorney-General, Second Reading Speech).

<sup>184</sup> It should be noted that the Advisory Working Group did not consider that an amendment to the *Criminal Code* (Qld), s 597A was necessary: Criminal Code Advisory Working Group, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996).

fact evidence on the basis that the evidence is true. This would be consistent with the approach in Victoria and Western Australia. An alternative interpretation is that section 132A only applies where there is a mere or speculative possibility of collusion (as opposed to a reasonable possibility of collusion).<sup>185</sup> This means it would be a matter for the trial judge to determine whether the possibility of concoction was real or speculative. And, if there was a real chance of concoction, then the evidence would be inadmissible as similar fact evidence. This interpretation would be similar to the operation of the uniform *Evidence Acts*.<sup>186</sup> While there has been some doubt as to the correct interpretation of section 132A, in *Phillips v The Queen*,<sup>187</sup> the High Court appeared to endorse the first (and broader) interpretation of the *Evidence Act 1977* (Qld) s 132A. The High Court's comments suggest that collusion (even if plausible) is a matter for the jury and not a determinant of the admissibility of evidence. This interpretation is consistent with the views expressed by the Queensland Law Reform Commission (QLRC).<sup>188</sup>

4.3.15 In 2000, the QLRC examined section 132A as part of its consideration of the evidence of children.<sup>189</sup> It also considered whether there should be a modification of the common law test for the admissibility of propensity evidence in the context of sexual offence cases involving children.<sup>190</sup> The Commission's view was that there was not any appropriate basis for distinguishing between cases involving children and adults. As its terms of reference were limited to making recommendations in relation to the evidence of children, it did not consider it appropriate to make any recommendations in relation to the rules for the admissibility of propensity evidence or section 132A.<sup>191</sup> In 2005, the QLRC again considered the rules for the admissibility of propensity evidence and the operation of section 132A as part of its review of the uniform *Evidence Acts*.<sup>192</sup> This Report noted the differences between the operation of the propensity rules under the uniform *Evidence Acts* and the Queensland law which consists of a combination of the common law and legislation. The Commission was not content merely to adopt the uniform evidence law's approach to concoction and considered that the ALRC should reconsider whether it should specifically recommend legislation to abrogate the principles of *Hoch*.<sup>193</sup>

### *Joint trials*

4.3.16 The *Criminal Code* (Qld), s 597(1) provides that a court may order separate trials if an accused will be prejudiced or embarrassed in the exercise of his defence. This is limited by the *Criminal Code* (Qld) s 597A(1AA) which provides:

(1AA) In considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

<sup>185</sup> QLRC, above n 101, 369-370; Criminal Justice Sexual Offences Taskforce, above n 13, 77. This interpretation would be consistent with the recommendation of the Criminal Code Advisory Working Group, above n 184, 116.

<sup>186</sup> See [2.3.16] ff.

<sup>187</sup> (2006) 225 CLR 303.

<sup>188</sup> QLRC, *A Review of the Uniform Evidence Acts*, Report 60 (2005) [5.22]-[5.25].

<sup>189</sup> QLRC, above n 101, 333, 368-371.

<sup>190</sup> *Ibid*, 361-368.

<sup>191</sup> *Ibid*, 374-375.

<sup>192</sup> QLRC, above n 188, Ch 5.

<sup>193</sup> *Ibid*, 5-7(c) and (d).

This provision reinforces *Evidence Act 1977* (Qld), s 132A<sup>194</sup> that concoction is a matter relevant to weight rather than admissibility. However, it does not create a presumption of joint trials in sexual assault cases.

4.3.17 In 2000, the QLRC re-examined the issue of ordering separate trials in the context of criminal proceedings concerning the commission of an offence against a child.<sup>195</sup> The QLRC examined the background to the introduction of the *Criminal Code* (Qld) s 597A(1AA) and acknowledged that it was not strictly necessary in light of the *Evidence Act 1977* (Qld) s 132A. However, the Commission's view was that 'it serves as a reminder of the effect of section 132A'.<sup>196</sup> The QLRC considered the appropriateness of adopting a provision modelled on the Victorian provision that creates a presumption in favour of a joint trial for sexual offences.<sup>197</sup> It concluded that such a presumption could lead to the jury hearing unacceptably prejudicial evidence that would not otherwise be admissible, and ultimately recommended against changing the law.<sup>198</sup>

### ***South Australia***

4.3.18 In South Australia, a review of rape and sexual assault laws was initiated by the government as part of a larger policy initiative called 'Our Commitment to Women's Safety in South Australia'. In 2006, a discussion paper was released that considered the joinder and severance of charges of sexual offences and the admissibility of evidence in sexual cases.<sup>199</sup> After a review of the position in other jurisdictions, comment was sought on whether the *Pfennig* test should be retained or replaced in South Australia.

4.3.19 In November 2008, the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act* came into force making significant changes to the rules of similar fact evidence and the law of joinder and severance in sexual offence trials involving different alleged victims.

#### *Admissibility of propensity evidence*

4.3.20 As discussed at 4.3.20, the *Criminal Law Consolidation Act 1935* (SA) creates a presumption of joint trials in cases where sexual offences are committed by the same person against different alleged victims. Cross-admissibility is the key issue in determining whether the presumption of a joint trial has been rebutted and, in determining this issue, limits are placed on the applicability of the common law rules in *Pfennig/Hoch*. Section 278(2a) provides that:

- (c) in determining admissibility for the purposes of paragraph (b) –
  - (i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and
  - (ii) the judge is not to have regard to –

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<sup>194</sup> See [4.3.13] ff.

<sup>195</sup> QLRC, above n 101, Ch 17.

<sup>196</sup> Ibid, 384.

<sup>197</sup> See [4.3.8] ff for a discussion of the Victorian provisions.

<sup>198</sup> QLRC, above n 101, 400-401.

<sup>199</sup> L Chapman, above n 103, ch 3.

(A) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or

(B) whether or not the evidence may be the result of collusion or concoction.

In cases involving multiple complainant, this is a major shift from the common law as questions of collusion are not part of the threshold question of admissibility. Rather, it is for the jury to decide issues of concoction or collusion and whether or not there is a reasonable explanation in relation to the evidence that is consistent with the innocence of the accused.

### *Joint trials*

4.3.21 The *Criminal Law Consolidation Act 1935* creates a presumption of joint trials in sexual offence cases involving different alleged victims. The presumption can be rebutted (so that a separate trial may be ordered) where evidence is not cross-admissible in relation to the counts relating to the other alleged victims. Section 278(2a) provides that:

Despite subsection (2) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences involving different alleged victims are joined in the same information, the following provisions apply:

- (a) subject to paragraph (b), those counts are to be tried together;
- (b) the judge may order a separate trial of a count relating to a particular alleged victim if (and only if) evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim.

An aim of the legislation was to 'limit the circumstances in which the court may sever counts of sexual offences against different alleged victims that are charged against the one defendant so that they are heard by different juries.'<sup>200</sup>

## ***United Kingdom***

### *Admissibility of propensity evidence*

4.3.22 The *Criminal Justice Act 2003* (UK) abolished the common law in relation to evidence of bad character (including similar fact evidence)<sup>201</sup> in criminal proceedings and established a statutory scheme.<sup>202</sup> A key change from the pre-existing United Kingdom (UK) common law was that under the Act, evidence of a defendant's criminal propensity was now prima facie admissible. Section 101(1)(d) provides that prosecution evidence of the defendant's bad character is admissible 'if it is relevant to an important matter in issue between the defendant and the prosecution'. Additionally, s 103 expressly provides that matters in issue between the defendant and prosecution include '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'.

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<sup>200</sup> South Australia, *Hansard*, House of Assembly, 25 October 2007 (M J Atkinson, Attorney-General) 1468.

<sup>201</sup> Under the *Criminal Justice Act 2003* (UK), 'bad character' is defined in s 98 to mean '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.'

<sup>202</sup> Section 99.

4.3.23 The prima facie admissibility of evidence of propensity relevant to an important issue at trial is limited by two conditions under the *Criminal Justice Act 2003* (UK). First, under s 101(3), the court must not admit evidence under section 101(1)(d) ‘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 proceedings that the court ought not to admit it’.<sup>203</sup> The second restriction on the admissibility of evidence of propensity only applies to evidence of prior convictions. Under s 103(2), 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 an offence of the same description as the one with which he is charged or an offence of the same category as the one with which he is charged. This is supplemented by a fairness test contained in s103(3) that provides ‘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 to his case’.

4.3.24 In relation to the question of concoction or contamination, the *Criminal Justice Act 2003* (UK), s 109 reflects the pre-existing common law position in *R v H*<sup>204</sup> that the trial judge is to determine the admissibility of evidence on the assumption that the evidence is true. In *R v H*, the House of Lords rejected the approach of the High Court in *Hoch* and held that when applying the probative value/prejudicial effect test in determining the admissibility of similar fact evidence, the judge should approach the question from the assumption that the evidence of the complainant was true. Only exceptionally should a judge make a determination on the veracity of evidence in circumstances where ‘no reasonable jury could accept the evidence as free from collusion’.<sup>205</sup> In all other cases where similar fact evidence is adduced, the jury determines whether the witness is to be believed or whether the witnesses have concocted or fabricated their accounts. Similarly, s 109 provides that:

- (1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.
- (2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.

4.3.25 Protection for the accused is provided by section 107(1) which requires a court to ‘either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury’ if the court is satisfied at any time after the close of the prosecution case that the evidence is contaminated and ‘the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe’.<sup>206</sup>

### *Joint trials*

4.3.26 In the UK, the statutory rules that govern the joinder/severance of counts are similar to those operating in Tasmania.<sup>207</sup> Rule 9 of the *Indictment Rules 1971* (UK), states that ‘charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character’. A court can order separate trials for lawfully joined counts under the *Indictment Act 1915* (UK), s 5(3) where the ‘court is of the

<sup>203</sup> See discussion in Roberts and Zuckerman, above n 169, 517.

<sup>204</sup> [1995] 2 AC 596.

<sup>205</sup> [1995] 2 AC 596, 612 per Lord Mackay of Clashfern LC.

<sup>206</sup> Roberts and Zuckerman, above n 169, 537. See also J Spencer, above n 169, 5.36.

<sup>207</sup> See [2.2] above.

opinion that a person charged may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or where for any other reasons it is desirable'. In the case of an offender charged with sexual offences in respect of multiple complainants, the cross-admissibility of the evidence is a crucial factor in the exercise of the discretion to sever. If the evidence of the complainants is cross-admissible as similar fact evidence, then courts will allow a joint trial as 'there would be no point in ordering separate trials'.<sup>208</sup> If evidence is not cross-admissible, there is no rule that the trial judge must or should invariably order severance.<sup>209</sup>

## 4.4 (3) Similar fact evidence prima facie admissible for sexual offences cases

### *United States*

4.4.1 In the United States, for sexual assault and child molestation cases, the *Federal Rules of Evidence* provide exceptions to the general restriction placed on the admissibility of propensity evidence. Evidence that an accused had committed an offence against other complainants can be admitted to establish the defendant's propensity to commit an act of sexual assault or child molestation.<sup>210</sup> The *Federal Rules of Evidence* provide:

#### Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

...

#### Rule 414. Evidence of Similar Crimes in Child Molestation Cases

- (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Under rules 413 and 414, the only limitation on the admissibility of evidence of the defendant's commission of another offence is that it must be relevant. Rule 401 defines relevance in terms of logical relevance: 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'.<sup>211</sup> It is not necessary for the accused to have been convicted of a prior offence and it is possible under the rules to admit evidence of previous acquittals. The court 'will admit the similar crimes evidence where the proponent offers sufficient evidence to persuade a reasonable fact-finder, by a preponderance of the evidence, that the defendant committed the earlier act'.<sup>212</sup>

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<sup>208</sup> Archbold, *Criminal Pleading, Evidence and Practice*, (2006) 1-172.

<sup>209</sup> See *Christou* [1997] AC 117.

<sup>210</sup> See *State v Burks* 905 So. 29 294.

<sup>211</sup> *Federal Rules of Evidence*, r 401.

<sup>212</sup> A Bocchino, *Commentary Federal Rules of Evidence*, National Institute for Trial Advocacy, r 413 (available on Lexis, accessed 17 October 2007).

4.4.2 Initially, there was some uncertainty about whether rules 413 and 414 are subject to a court's discretion to exclude relevant evidence under rule 403.<sup>213</sup> Rule 403 empowers the court to exclude evidence where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or of misleading the jury. However, it appears that most courts have generally held that rules 413 and 414 are subject to the general discretion in rule 403 to exclude evidence.<sup>214</sup> The possibility of concoction is not a matter relevant to the exercise of the trial judge's discretion under rule 403, as questions of credibility are matters for the fact finder. The trial judge must determine whether the probative value of the evidence is substantially outweighed by unfair prejudice on the basis that the evidence will be accepted by the jury.<sup>215</sup>

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<sup>213</sup> See M Bender, *Weinstein's Federal Evidence*, [413.04] (available on Lexis, accessed 17 October 2007). See also NZLRC, above n 155, [4.69]-[4.7].

<sup>214</sup> M Bender, *ibid*, [413.04]; [414.04] (available on Lexis, accessed 17 October 2007).

<sup>215</sup> M Bender, *US Code Service Federal Rules of Evidence Commentary*, r 403 (available on Lexis, accessed 17 October 2007).

## Part 5

# Options for Reform

Part 5 outlines four main options for reform: (1) making no change to the current law; (2) making concoction a matter for the jury to determine; (3) creating a presumption of a joint trial; (4) removing the rules of tendency/coincidence evidence for sexual offences.

### 5.1 Option 1 – No change to the current law

5.1.1 Option 1 is that there should be no change to the current law in Tasmania. This would mean that the reasonable possibility of concoction would continue to be a matter relevant to the admissibility of tendency/coincidence evidence under the *Evidence Act 2001* (Tas), ss 97, 98 and 101.

5.1.2 An advantage of the current position is that it provides a high level of protection to the accused. The New South Wales Taskforce considered that the (undue) weight that the jury may attach to propensity evidence warranted erring on the side of caution and keeping evidence from the jury that may have been the product of concoction or influence.<sup>216</sup> In this respect, the Law Commission (UK) has pointed out that one factor weighing in favour of judges' making an assessment of the probability of concoction is that a "mind of twelve" is susceptible to prejudice, perhaps more so than a single judicially trained mind; and it is for this reason, it may be argued, that, if the evidence may unfairly sway a jury although it is unreliable, it should not reach the jury at all'.<sup>217</sup>

5.1.3 In its consideration of the issue of concoction, the ALRC's view was that the *Pfennig/Hoch* approach was contrary to the policy of the uniform *Evidence Acts*. The ALRC stated:

The 'no rational explanation' test will exclude probative evidence of minimal prejudicial effect. Even though the probative value may clearly outweigh any prejudicial effect, it can be excluded under the no rational explanation test.<sup>218</sup>

It prevents the application of the balancing exercise required by s 101, as only one aspect of that exercise is considered – the probative weight of the evidence. Accordingly, preservation of the *Hoch* test precludes the application of s 101 according to its own terms. However, the ALRC considered that no change was necessary to the provisions of the uniform *Evidence Act* in light of the decision in *Ellis*.<sup>219</sup> As stated at [2.3.18], the retention of the need to exclude the possibility of concoction as a determinant of admissibility of tendency and coincidence evidence runs counter to the decision in *Ellis*. The ALRC considered that the courts would further develop the law away from *Hoch* and obviate the need for legislative intervention. It seems that this may have been an overly optimistic

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<sup>216</sup> Criminal Justice Sexual Offences Taskforce, above n 13, 80.

<sup>217</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, Consultation Paper 141 (1996) [10.88]. The Law Commission ultimately recommended that concoction should usually be a matter for the jury: see Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, Law Commission 273 (2001).

<sup>218</sup> ALRC, above n 39, [11.68]. This was also recognised by the Law Commission as a disadvantage of the *Pfennig* approach: Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings* ibid, [11.12].

<sup>219</sup> See ALRC, above n 39, [11.68].

view. Retaining the status quo fails to take account of the cases subsequent to *Ellis* where concoction has been held to be relevant to the tests under the *Evidence Acts* s 97, 98 and 101.<sup>220</sup>

5.1.4 An additional argument against retaining the status quo is that the issue of the weight to be attached to evidence is a matter for the jury. This argument was outlined by Lord Mustill in *R v H*, who stated that credibility is a matter for the jury:

Credibility is always for the jury, and I can see no reason why the special feature that the testimony is adduced to support a charge concerning acts said to have been done to the person with whom the witness is suspected of conspiring, rather than to the witness herself or himself, should affect this fundamental principle in any way.<sup>221</sup>

In applying the ‘no rational inference’ test and the *Hoch* concoction test, the trial judge essentially performs the task of the jury and assesses the strength of the evidence. The voir dire procedure places the trial judge in the awkward position of deciding the question of whether complainants are telling the truth about their allegations of sexual assault when determining the admissibility of evidence.<sup>222</sup> In short, the *Hoch* test permits the defence to argue that the evidence should be excluded because it is not true. No other exclusionary rule requires the court to determine the veracity of evidence as a basis for admission. This point was made by McHugh J in *Pfennig v The Queen*, where he stated that he did ‘not recollect any other area of the Australian law of evidence where the test that the judge applies to the admissibility of a class of evidence is the same test that the jury must apply to the question of guilt if the evidence is admitted’.<sup>223</sup>

5.1.5 The current law is said to make sexual assault prosecutions too difficult.<sup>224</sup> It has been argued that the current approach does not strike the appropriate balance between the rights of the accused and the benefit to the community of a fair trial.<sup>225</sup> For example, the NSW Adult Sexual Assault Interagency Committee considered that ‘it was not in the public interest for wider patterns of sexual abuse or uncharged sexual conduct on other parties to be held to such strict tests of admissibility’.<sup>226</sup> Similarly, the ALRC and the Human Rights Commission identified the jury’s ignorance about claims by other children of abuse by the same accused as a major problem with the rules of tendency and coincidence evidence.<sup>227</sup> This was also recognised in the recent amendments to the rules of joinder and severance in South Australia, where the Attorney-General observed that severance ‘in sexual cases ... and particularly those where a person is charged with offences against different children, ... often means that a jury may not hear evidence about an alleged offence in its full context’.<sup>228</sup>

5.1.6 Allegations of concoction are easy to make when complainants are known to each other, and the need for a voir dire to determine the admissibility of evidence increases the trauma and distress caused by the trial process. Allowing concoction to be relevant to the admissibility of

<sup>220</sup> A similar point was made by the QLRC, above n 188, [5.120].

<sup>221</sup> [1995] 2 AC 596, 620.

<sup>222</sup> See [1995] 2 AC 596, 622 per Lord Mustill.

<sup>223</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 517. This was referred to in ALRC, above n 39, [11.67]. The Law Commission also identified the fact that ‘it requires the judge to assess the strength of the evidence’ and so requires ‘the judge to apply the same test to the evidence as the jury would have to apply, if it were admitted’ as a disadvantage of the Australian common law test in *Pfennig*, see Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 217, [11.12].

<sup>224</sup> D Hamer, ‘The structure and strength of the propensity inference: singularity, linkage and other evidence’ (2003) 29 *Monash University Law Review* 137, 147 fn 96.

<sup>225</sup> Standing Committee on Law and Justice, above n 102, [4.92].

<sup>226</sup> NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004) 8.

<sup>227</sup> ALRC and HREOC, above n 90, [14.87].

<sup>228</sup> South Australia, Hansard, House of Assembly, Thursday 25 October 2007, 1468 (M Atkinson, Attorney-General).

tendency/coincidence evidence seems to expose the complainant to cross-examination on the voir dire as a matter of course.<sup>229</sup>

Question 4.

Should the current law in relation to tendency and coincidence evidence be retained?

## 5.2 Option 2 – Amend current law with possibility of concoction a matter for the jury

5.2.1 Option 2 is to amend the current law so that the possibility of concoction is a matter for the jury and not part of the test for admissibility. This is the approach adopted in Queensland. It is also the situation in Victoria,<sup>230</sup> Western Australia, South Australia, and the United Kingdom. It was considered the minimum change necessary by the 2005 ACT report that examined sexual assault.<sup>231</sup>

5.2.2 An advantage of this approach is that it allows the jury, as fact-finder, to determine the likelihood of concoction and the weight to be attached to evidence.<sup>232</sup> The disadvantages outlined in relation to Option 1 are advantages of Option 2. As discussed, amending the current law so that the possibility of concoction is a matter for the jury accords with the policy of the uniform *Evidence Acts* and limits the number of times a complainant will be required to give evidence.

5.2.3 A disadvantage of this approach may be that it is seen to afford insufficient protection to the accused. As discussed in relation to Option 1, there is the danger that the jury may attach undue weight to the evidence and that:

If there is a real possibility that the evidence has been concocted or has been the product of collusion, and there is evidence to support this, perhaps the law should err on the side of caution, and in favour of the accused who is presumed innocent, so as to exclude the evidence. Once the evidence has been admitted it is difficult to tell the jury not to rely upon it, and there may be concern that the jury will engage in the process of reasoning “that where there is smoke there must be fire.”<sup>233</sup>

The concern is that juries will not follow judicial directions that they must be satisfied that the evidence is free of concoction. Keane has written that ‘there is a serious risk that notwithstanding such directions, the jury will follow a forbidden line of reasoning that since the accused appears to have the disposition towards the type of misconduct in question, he is guilty of the misconduct alleged’.<sup>234</sup>

5.2.4 Contrary to this, there is an argument that juries may follow judicial directions too zealously. This may present difficulties for the prosecution if the possibility of concoction is solely a matter for the jury. There is the possibility that judges may take a more pragmatic view of the possibility of concoction than juries. In the Tasmanian context, the fact of association has not been taken by judges to mean that there was in fact concoction. If concoction is solely a jury issue, concoction may be more

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<sup>229</sup> See discussion at [3.2]. This benefit was recognised by the Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 217, [15.21]-[15.22].

<sup>230</sup> However, it is foreshadowed that the Victorian position will change to the uniform *Evidence Act* position, see fn 154.

<sup>231</sup> Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 117, 201.

<sup>232</sup> See Standing Committee on Law and Justice, above n 102, [4.32]. This is discussed at [5.1.4].

<sup>233</sup> Criminal Justice Sexual Offences Taskforce, above n 13, 82.

<sup>234</sup> Adrian Keane, ‘Is there a weakness in the current law on similar fact evidence?’ Memorandum 32, in House of Commons Home Affairs Committee, *The Conduct of Investigations into Past Cases of Abuse in Children’s Homes*, fourth report of session (2001-2002), HC 836, vol 2, (Oct 31 2002) 666-667.

vigorously pursued as an issue at trial.<sup>235</sup> This may alter the nature of the warning given to juries about tendency and coincidence evidence and it is possible that in endeavouring to follow instructions in relation to concoction, juries may overcompensate:

research has also found that jurors may strive to compensate for any prejudice they might feel, following the direction from the judge, and may in fact “over-correct”, making decisions that are overly favourable to the defendant in an effort to avoid prejudice.<sup>236</sup>

Where concoction is a matter for the jury, if the possibility of concoction or other influence arises, it is necessary for the judge to provide directions about concoction to the jury. In Victoria, if there is a suggestion of concoction or other influence, the judge is required to direct the jury that ‘they must first be satisfied beyond reasonable doubt that the witnesses’ evidence was not contaminated by any such factor, before using the evidence’ as similar fact evidence.<sup>237</sup> In addition, judges may be persuaded to elevate this evidence to evidence of a kind requiring a warning under *Evidence Act*, s 165 in relation to unreliable evidence.

5.2.5 There is a possibility that changing the rules in relation to the relevance of concoction to the admissibility of tendency and coincidence evidence will not be sufficient to reduce applications to sever trials on the basis of the admissibility of tendency/coincidence evidence. Concoction is one ground on which defence counsel may base an argument that trials should be severed. However, other grounds may form the basis of application for separate trials on the grounds that the evidence of one complainant is not cross-admissible. In particular, defence counsel may argue that the evidence should not be admitted as tendency or coincidence evidence, as the events or circumstances are not sufficiently similar. The court may be required to hold a voir dire to determine this issue. However, such applications could much more readily be determined on the papers.

Question 5.

Should the possibility of concoction be a matter that is determined by the jury? Or should it remain relevant to the test for admissibility of tendency/coincidence evidence?

## 5.3 Option 3 – create a presumption of joint trials

5.3.1 Option 3 is to amend the law to create a presumption in favour of joint trials in cases of sexual abuse even if the evidence of the multiple complainants is not cross-admissible. As outlined in Part 2, the current position in Tasmania is that the issue of joinder (that is, whether there is a joint or separate trial) is largely dependent on the cross-admissibility of evidence. As a general rule, if the evidence on each charge is not cross-admissible in relation to the other charges, the court will order that the charges be separately tried.<sup>240</sup> This differs from the approach in Victoria, South Australia and Western Australia, where the rules of severance and joinder have been changed to facilitate joint trials. In these jurisdictions, the changes in relation to joint trials supplement provisions that set out that the possibility of concoction is a matter for the jury to determine when assessing the weight of the

<sup>235</sup> In Tasmania, the general approach is that if the judge has rejected the concoction argument and ruled that the evidence is cross-admissible, defence counsel only do a ‘very watered down’ version in front of the jury: Correspondence with Mike Stoddart, Principal Crown Counsel, 21 August 2008.

<sup>236</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 217, [7.18] referring to E Schaefer and K Hansen, ‘Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation’ (1990) 14 *Criminal Law Journal* 157.

<sup>237</sup> VLRC, above n 148, [3.135]. See also, *R v DCC* (2004) 11 VR 129, 147.

<sup>240</sup> See [2.2].

evidence.<sup>241</sup> The intention of Parliament in these three cases was that trials for multiple sexual offending should routinely be held together.<sup>242</sup>

5.3.2 In Victoria, the *Crimes Act 1958* (Vic) s 372(3AA)-(3AB) creates a presumption that multiple allegations should be heard together:

(3AA) Despite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.

(3AB) The presumption created by sub-section (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.

As seen from s 372(3AB), this presumption is not rebutted because evidence is not cross-admissible. While the provision makes it easier for cases involving multiple complainants to be heard together, the Victorian Court of Criminal Appeal has held that the 'capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of the discretion'.<sup>243</sup> As such, the cross-admissibility of evidence 'will in most cases be a powerful factor influencing the exercise of the discretion'.<sup>244</sup>

5.3.3 The operation of the *Crimes Act 1958* (Vic) s 372(3) was reviewed by the VLRC. While it seems that the amendment has had some measure of success in addressing the almost automatic severance of trials, the Commission did not find unequivocal evidence of its success. The Commission sought further information on whether cases involving more than one complainant were being heard together more frequently than was the case before the 1997 reform.<sup>245</sup> In its Final Report, it was noted that there were only four responses received and no clear trend was identifiable – two made no comment on frequency as it was not known, one said it did not appear that matters were being heard together more often and one said that they were.<sup>246</sup> The Commission also conducted an examination of decisions of the Court of Appeal to try to determine the success of the provisions.<sup>247</sup> The results indicated that the provision has enjoyed a measure of success, in that the Commission considered that some cases provided evidence that trials were not automatically being severed.<sup>248</sup> However, the Commission indicated that in other cases it was difficult to work out why severance was ordered.<sup>249</sup> Ultimately, the Commission recommended no amendment to the *Crimes Act 1958* (Vic) s 372 and s 398A.

5.3.4 The *Criminal Procedure Act 2008* (Vic) aims to overhaul and modernise Victoria's criminal procedure laws.<sup>250</sup> It repeals many sections of the *Crimes Act 1958*, including s 372. The substance of s 372 is re-enacted in *Criminal Procedure Act 2008* (Vic), s 194 which creates a presumption in favour of joint trials for charges of sexual offences:

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<sup>241</sup> See [4.3].

<sup>242</sup> See Western Australia, *Hansard*, Legislative Assembly, 30 June 2004 (Attorney-General, Second reading speech, *Criminal law Amendment (Sexual Assault and other matters) Bill 2004*); Victoria, *Hansard*, 9 October 1997, 431 (Attorney-General) cited in Standing Committee on Law and Justice, above n 102, 106; South Australia, *Hansard*, 25 October 2007, 1468.

<sup>243</sup> *R v Papamitrou* (2004) 7 VR 375, 376 per Winneke P.

<sup>244</sup> *Ibid.* See also *R v Buckley* (2004) 10 VR 215.

<sup>245</sup> VLRC, above n 144, question 58.

<sup>246</sup> VLRC, above n 125, [4.173].

<sup>247</sup> The Commission recognised the difficulty of obtaining a 'complete picture of what is happening with severance by simply examining Court of Appeal decisions in which severance was an issue': see VLRC, *ibid.*, [4.170].

<sup>248</sup> *Ibid.*, [4.1.79].

<sup>249</sup> *Ibid.*, [4.178].

<sup>250</sup> Victoria, *Hansard*, 4 December 2008, 4981 (Mr Rob Hulls, Attorney General, 2<sup>nd</sup> reading speech).

S 194 Order for separate trials – sexual offences

...

- (2) Despite section 193 and any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.
- (3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

5.3.5 In South Australia, the *Criminal Law Consolidation Act* (SA), s 278(2a) also creates a presumption of joint trials in sexual offence cases involving allegations from different victims against the same accused. However, unlike the Victorian position, the presumption is rebutted if the evidence is not cross-admissible.

5.3.6 In Western Australia, a presumption has not been created in favour of a joint trial. However, significant changes have been made to the rules of joinder and severance by eliminating the principle set out in *De Jesus*.<sup>251</sup> The *Criminal Procedure Act 2004*, s 133 provides:

- (3) If a court is satisfied that an accused is likely to be prejudiced in the trial of a prosecution notice or indictment because it contains 2 or more charges, the court may order -
    - (a) that the accused be tried separately on one or more of the charges; and
    - (b) the prosecution to tell the court the order in which the charges will be tried.
- ...
- (5) In deciding whether to make an order under subsection (3) or (4) in respect of an indictment to be tried by a jury, it is open to a superior court -
    - (a) to decide that any likelihood of the accused being prejudiced can be guarded against by a direction to a jury;
    - (b) to so decide irrespective of the nature of the offence or offences charged; and
    - (c) to so decide even if –
      - (i) the evidence on one of the charges is inadmissible on another; or
      - (ii) the evidence against one of the accused is not admissible against another, as the case requires.
  - (6) In considering, for the purposes of this section, the likelihood of an accused being prejudiced in the trial by a jury of an indictment that contains 2 or more charges of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

5.3.7 Defence counsel have argued the *De Jesus* approach should continue to apply to s 133 (that is, in trials that involve sexual offences, if the evidence is not cross-admissible separate trials should be ordered because no jury direction would be sufficient to cure the highly prejudicial nature of the evidence).<sup>252</sup> However, case law has accepted that the legislative provisions were designed to overcome *De Jesus* and that prejudice (even in cases of multiple sexual offending) can be guarded against by jury directions.<sup>253</sup> As with Victoria, cross-admissibility still remains central to the exercise

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<sup>251</sup> See *Western Australia v Osborne* [2007] WASCA 183, [11] per Wheeler JA.

<sup>252</sup> See *Donaldson v Western Australia* [2005] WASCA 196, [77] per Roberts-Smith JA.

<sup>253</sup> *Ibid*, [108] per Roberts-Smith JA; *Western Australia v Osborne* [2007] WASCA 183, [48]-[49] per Pullin JA.

of the discretion.<sup>254</sup> There is support for the creation of a presumption of a joint trial in cases of sexual assault. In relation to child witnesses, the ALRC and HREOC recommended that the joinder rules should be reviewed in light of the hardship these rules caused to particular child victim witnesses.<sup>255</sup> The Police Royal Commission Paedophile Inquiry considered that in some cases, especially those involving familial abuse, there may be good reasons for joinder. It recommended that:

Consideration be given to permitting judges to take into account, as a relevant circumstance, in any application to sever counts in a trial, involving more than one complainant, any adverse impact that may have on complainants under the age of 16 years.<sup>256</sup>

Recommendations for the presumption of a joint trial have also been made in two New South Wales reports. The New South Wales Standing Committee on Law and Justice recommended changes to the rules that govern the joinder of trials in multiple proceedings against one defendant, as contained in the *Criminal Procedure Act 1986* s 64.<sup>257</sup> The Committee recommended:

Recommendation 18

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to create a presumption that, in child sexual assault prosecutions, multiple counts of an indictment will be tried together.

Recommendation 19

The Committee further recommends that the Attorney General amend the *Criminal Procedure Act 1986*, to ensure that, when considering the severance of trials, the court:

- is not permitted to take into account the prior relationship or acquaintance of the complainants, and
- must ensure that the interests of justice are at all times paramount.

The NSW Adult Sexual Assault Interagency Committee also identified the amendment of the *Criminal Procedure Act 1986* (NSW) for sexual offences (not only child sexual assault) as an option for reform.<sup>258</sup>

5.3.8 Other reports have recommended that no such presumption be created. In 2005, the New South Wales Taskforce was established to look at the issues surrounding sexual assault in the community and the prosecution of such matters within the criminal justice system. The Taskforce examined the question of separate trials where multiple offences are alleged against an accused, and in particular whether there should be a presumption that multiple counts be tried together. Ultimately, the Taskforce was unable to reach an agreement on the appropriateness of such a presumption. There were diametrically opposed views within the Taskforce and these could not be reconciled. As a consequence, the recommendations contained in the report were made by the Criminal Law Review Division (CLRD).<sup>259</sup> The CLRD recommended that:

31. NSW should not create a presumption that multiple counts of an indictment be tried together where the evidence on one count is not admissible against the accused on another count. In considering an application for separation of counts, the interests of justice should be paramount.

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<sup>254</sup> See *Donaldson v Western Australia* [2005] WASCA 196, per Roberts-Smith JA; *Western Australia v Osborne* [2007] WASCA 183.

<sup>255</sup> ALRC and HREOC, above n 90, 334-335.

<sup>256</sup> Police Royal Commission, *Paedophile Inquiry* (vol 4-6, 1997) 1098, cited in Criminal Justice Sexual Offences Taskforce, above n 13, 82.

<sup>257</sup> Standing Committee on Law and Justice, above n 102, [4.76] ff.

<sup>258</sup> NSW Adult Sexual Assault Interagency Committee, above n 226, 21.

<sup>259</sup> The CLRD is a small group contained in the Attorney General's Department of New South Wales.

32. If the above recommendation is not accepted, there should be limited amendment to s 21 *Criminal Procedure Act* 1986 to make it clear that when considering whether to sever a count on an indictment, the court must not only consider the interests of the accused in receiving a fair trial, but also the interests of the community in reducing trauma and distress to children and other vulnerable witnesses.<sup>260</sup>

The QLRC also rejected creating a presumption in favour of joint trials in cases of sexual abuse.<sup>261</sup> At the other end of the spectrum, the Law Commission (UK) recommended a presumption in favour of severance where evidence is not cross-admissible unless the court is satisfied that the defendant can receive a fair trial without severance and it is otherwise desirable that the counts are heard together.<sup>262</sup>

5.3.9 An advantage identified in favour of a presumption of joint trials is that it would achieve a more appropriate balance between the rights of the accused and the rights of the complainant to a fair trial.<sup>263</sup> The advantages of a joint trial were discussed in Part 3. It was argued that the jury is provided with a more complete picture and is not ignorant of the claims of other complainants in a trial where the credibility of the complainant is challenged.<sup>264</sup> If a complainant is giving evidence in relation to what the accused did to them and also what they witnessed in relation to other complainants, the joinder of trials means that the complainant would only be required to give evidence on one occasion. This would counter the situation that occurred in *R v M*,<sup>265</sup> where there were separate trials for rape and indecent assault held in relation to sexual abuse by the accused in respect of his daughter and her friend. The daughter was required to give evidence at both trials.

5.3.10 The dangers of joint trials are also outlined in Part 3. In relation to the creation of a presumption in a joint trial, concerns have focussed on the potential for unfair prejudice for the accused. This was highlighted by the Law Commission (UK) which wrote that:

the danger of a single trial for a variety of counts, where evidence on different counts is not cross-admissible, is that the fact-finders may use each count to bolster the other and support an assumption that the defendant must be guilty of at least something.<sup>266</sup>

The QLRC also considered that such a presumption could lead to the jury hearing unacceptably prejudicial evidence that would not otherwise be admissible.<sup>267</sup> It endorsed the views of Gibbs CJ in *De Jesus v R* that 'sexual cases are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard'.<sup>268</sup>

5.3.11 The Institute also notes that the Victorian and Western Australian experience (and the wording of the legislation itself) would suggest that cross-admissibility will continue to be central to severance applications. The creation of a presumption of a joint trial in cases of sexual assault may ultimately result in less successful severance applications and more joint trials. However, it is unlikely that it will result in a reduction in the number of applications that are made. For this reason, of itself, Option 3 is unlikely to reduce the number of voir dire hearings where complainants are required to give evidence to determine the cross-admissibility of evidence.

<sup>260</sup> NSW Adult Sexual Assault Interagency Committee, above n 226, 85.

<sup>261</sup> See QLRC, above n 101, Ch 17.

<sup>262</sup> Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 217, [16.16]-[16.20] and recommendation 16.21. This was not adopted by the government and the law on severance remains as set out in *Christou* [1997] AC 117. There is no special rule favouring severances in cases of multiple sexual offences.

<sup>263</sup> Standing Committee on Law and Justice, above n 102, [4.76] ff.

<sup>264</sup> This point was made by ALRC and HREOC, above n 90, in relation to children, see discussion at [3.3.8]-[3.3.9].

<sup>265</sup> 23 February 2005, 9 February 2005.

<sup>266</sup> Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 217, [16.8].

<sup>267</sup> QLRC, above n 101, 400-401.

<sup>268</sup> (1986) 61 ALJR 3.

Questions

6. Should there be a presumption created in favour of a joint trial for cases of sexual assault?
7. In what circumstances should such a presumption apply? For example, should it apply irrespective of the cross-admissibility of evidence? Should it apply to child sexual abuse cases or sexual offences generally?

## 5.4 Option 4 – remove special admissibility restrictions for tendency/coincidence evidence with such evidence subject to a general discretion to exclude

5.4.1 Option 4 would involve removing the special admissibility restrictions that apply for tendency/coincidence evidence, so that such evidence would be admissible if relevant and subject to the general discretions to exclude. This is the approach taken in the United States in relation to sexual offences and child molestation, where such evidence is prima facie admissible, subject to the general discretions to exclude evidence.<sup>269</sup>

5.4.2 Under the *Evidence Act 2001*, relevance is the threshold test for the admissibility of evidence. To be admissible the evidence must be either directly relevant to a fact in issue or indirectly relevant to a fact in issue. Irrelevant evidence is not admissible. Relevance is defined in s 55 in the following way:

- (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates to:
  - (a) the credibility of a witness; or
  - (b) the admissibility of other evidence; or
  - (c) a failure to adduce evidence.

In determining whether evidence is relevant, there must be some rational connection between the evidence and the fact in issue that helps determine the existence of the fact in issue one way or another.

5.4.3 Relevance is a necessary requirement but it is not a sufficient requirement. Evidence may be subject to an exclusionary rule. Discretions to exclude evidence are contained in s 135 and s 137. Section 135 provides that:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

Section 137 is a mandatory provision (rather than a true discretion) that applies only in criminal proceedings:

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<sup>269</sup> See [4.4].

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

5.4.4 An option for reform that has been suggested is that the coincidence rule in s 98 be repealed. Odgers has commented:

It may be doubted whether this attempt [in the *Evidence Act*, s 98] to control reasoning via ‘improbability’ serves any useful purpose. It is arguable that it unnecessarily complicates what should be the straightforward application of logical analysis and should be removed from the Act.<sup>270</sup>

This would mean that the admissibility of coincidence evidence would be governed by the rules of relevance, and the risk of unfair prejudice in the exercise of the trial judge’s discretion to exclude evidence.

5.4.5 There has also been support within Australia for a model that provides a special category of offences where the usual rules of tendency and coincidence do not apply.<sup>271</sup> For example, the New South Wales Standing Committee on Law and Justice recommended that tendency evidence should be prima facie admissible in a sexual assault trial whilst retaining a general discretion to exclude under s 137. The Committee considered that it was beneficial to provide the court with guidelines to assist with the balancing test required by s 137, in addition to those provided by s 192.<sup>272</sup> The Committee recommended:

#### **Recommendation 14**

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to provide that:

- (1) In relation to the prosecution of a child sexual assault, and subject to (2) and (3) tendency evidence relevant to the facts in issue is admissible and is not affected the operation of ss 97, 98 and 101.
- (2) In relation to evidence admitted under (1) a court must, in applying the balancing test under s 137, take into account the following in addition to the matters set out in s 192:
  - the nature of the other evidence in the proceeding
  - the public interest in admitted all relevant evidence
  - the likelihood of any harm that may be caused by excluding the evidence.
- (3) In relation to evidence admitted under (1) a court must not, in applying the balancing test under s 137, take into account the prior relationship between the complainant and other witnesses.<sup>273</sup>

In 2005, the Office of the Director of Public Prosecutions (ACT) and Australian Federal Police released a report, *Responding to Sexual Assault: The Challenge of Change*, that considered the rules in relation to tendency and coincidence evidence and joint trials where a single accused was charged with offences against multiple victims. This report concluded that there was merit in considering changes as suggested by the New South Wales Committee.<sup>274</sup>

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<sup>270</sup> S Odgers, above n 2, [1.3.6880].

<sup>271</sup> This suggestion for reform was made in 1985 by Sturgess, see D Sturgess, *An Inquiry into Sexual Offences Involving Children and Related Matters* (1985) cited in QLRC, above n 101, 363.

<sup>272</sup> *Evidence Act*, s 192 provides in determining whether to give any leave, permission or direction, the court may take into account whether it will unduly lengthen or shorten the hearing, whether it is unfair to any party, the importance of the evidence and the nature of the proceedings.

<sup>273</sup> Standing Committee on Law and Justice, above n 102, [4.65].

<sup>274</sup> Office of the Director of Public Prosecutions (ACT) and Australia Federal Police, above n 95, 201.

5.4.6 In 2004, the NSW Adult Sexual Assault Interagency Committee released a report examining proposals for sexual assault law reform.<sup>275</sup> This report was not confined to child sexual assault. It included a review of the rules of tendency/coincidence evidence and the rules governing the joinder/severance of trials. The Committee considered that the current rules for admissibility under the uniform *Evidence Acts* imposed a very high burden on the Crown and that '[i]t was not in the public interest for wider patterns of sexual abuse or uncharged sexual conduct on other parties to be held to such strict tests of admissibility'.<sup>276</sup> It noted that the exclusion of evidence on the ground of the reasonable possibility of concoction made the tests 'even more difficult to satisfy'.<sup>277</sup> The Committee suggested three options for reform:

- Amendment of sections 97 and 98 of the *Evidence Act 1995 (NSW)* to make tendency and coincidence evidence prima facie admissible if relevant to a fact in issue at a sexual assault trial.
- Introduction of a section in *Evidence Act 1995 (NSW)* abolishing the current 'concoction' test and introducing a new test setting out a higher threshold as to whether concoction has occurred.
- Amendment of section 101 of the *Evidence Act 1995 (NSW)* to abolish the importation of the common law as set out in *Pfennig* (the 'no rational view' test) to the interpretation of this section, and further amendment setting out the requirement for the Judge to undertake a balancing exercise in determining whether to admit the evidence.<sup>278</sup>

5.4.7 A suggestion for special rules for admissibility of tendency evidence in child sexual abuse cases has also been made by Dr Anne Cossins, Chair of the National Child Sexual Assault Reform Committee, who proposes amendment of the uniform *Evidence Acts* as follows:

Proposed s 97A – Admissibility of charged or uncharged acts of sexual misconduct in a child sexual assault trial:

- (1) This section applies to prescribed sexual offence proceedings.
- (2) Evidence of a charge or uncharged act of sexual misconduct that is relevant to a fact in issue in a proceeding for a child sex offence is, subject to subsections (3) & (4), admissible.
- (3) For the purposes of sub-section (2), evidence of a charged or uncharged act of sexual misconduct is defined as evidence given by a witness other than the complainant about the accused's sexual behaviour with that witness.
- (4) In exercising the discretion under sections 135 or 137, the court cannot take into account whether or not the witness giving the evidence and the complainant has a prior relationship, or whether or not the evidence may be the result of collusion, concoction or suggestion.
- (5) When exercising its discretion under sections 135 or 137, a court must, in addition to the matters set out in section 192, take into account the following:
  - (i) the public interest in convicting persons who commit crimes;
  - (ii) whether there exists other evidence capable of amounting to corroboration;
  - (iii) the rights of a person recognised by the Convention on the Rights of the Child and the likelihood of any contravention of those rights and any harm that may be caused by excluding the evidence;
  - (iv) the nature of the other evidence in the proceedings.
- (6) Sexual offences means any of the following: (list of child sex offences).
- (7) This provision has effect despite any other provision to the contrary.

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<sup>275</sup> NSW Adult Sexual Assault Interagency Committee, above n 226.

<sup>276</sup> *Ibid*, 8.

<sup>277</sup> *Ibid*.

<sup>278</sup> *Ibid*, 9-10.

5.4.8 Several advantages of Option 4 can be identified. The difficulty of prosecuting sexual offences, the particular nature of sex offenders, and the special vulnerability of sexual assault complainants have been advanced as reasons in favour of special rules for this category of case. Arguments that have been advanced to support special rules include: (1) the importance of credibility in sexual assault cases;<sup>279</sup> (2) the difficulty of proving sexual offences;<sup>280</sup> (3) the problem posed by serial rapists;<sup>281</sup> and (4) that withholding information of past misconduct from the jury means the jury is ‘being misled and its decision-making proceeds on an improper basis.’<sup>282</sup>

5.4.9 In addition, it has been argued that evidence of previous sexual offending is highly probative.<sup>283</sup> Temkin suggests that ‘[i]n cases where multiple victims come forward quite independently with similar stories, it is highly improbable that they are all fabricated’.<sup>284</sup> In a similar vein, Gans has pointed out that allegations of rape are uncommon, and so it is significant when a person is accused of rape on several occasions. He suggests that it may just be bad luck, but two other explanations are more likely:

One is that the person is, instead, the victim of a process of concoction, collusion or suggestion that generated the multiple allegations. The other is that it is the complaints who are the victims and the person’s propensity to rape that is the common cause of the multiple allegations’.<sup>285</sup>

5.4.10 Other arguments could be advanced in favour of a special category for sexual offenders: (1) sexual offences should be treated differently because of the particular psychology of the perpetrators;<sup>286</sup> (2) sexual offenders should be treated differently because of the particular danger they pose to society;<sup>287</sup> and (3) sexual offences should be treated differently because of the particular problems they pose in gathering evidence.<sup>288</sup>

5.4.11 After considering the arguments in favour of the development of special rules for sexual offences, the Law Commission (UK) rejected such an approach:

We are still of the view that the case for such a rule has not been made out. Indeed, since sexual misconduct tends to be more prejudicial than other misconduct, the arguments for a general exclusionary rule seem if anything to be stronger in this case.<sup>289</sup>

5.4.12 The New Zealand Law Reform Commission (NZLRC) has also questioned the appropriateness of any special rule removing the application of the propensity rules for sexual

<sup>279</sup> J Temkin, *Rape and the Legal Process* (2<sup>nd</sup> ed, 2002) 238-239. See also A Orenstein, ‘Deviance, due process, and the false promise of federal rule of evidence 403’ (2005) 90 *Cornell Law Review* 1487, 4. The importance of the credibility of complainants in a rape/sexual assault trial was discussed in Part 3.

<sup>280</sup> J Temkin, *ibid*, 238; A Orenstein, *ibid*, 4.

<sup>281</sup> J Temkin, *ibid*, 240. See also A Orenstein, *ibid*, 4. The Tasmania Law Reform Institute recently reviewed recidivism data for its report on *Sentencing*. It found that ‘research evidence suggests that special provisions targeting sex offenders cannot be justified on the ground that sex offenders are more likely to re-offend than other categories of offenders’: see Tasmania Law Reform Institute, *Sentencing* (2008) [6.3.10].

<sup>282</sup> J Temkin, *above* n 279, 239.

<sup>283</sup> *Ibid*, 240. See also A Orenstein, *above* n 279, 4-5.

<sup>284</sup> J Temkin, *ibid*, 239.

<sup>285</sup> J Gans, *above* n 146, 229. Note also the observation of Wheeler JA in *Western Australia v Osborne* [2007] WASCA 183, [29].

<sup>286</sup> These arguments were outlined and rejected by the Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, *above* n 217, [9.25]-[9.27]. See also J Temkin, *above* n 279, 235-238.

<sup>287</sup> Law Commission (UK), *ibid*, [9.28]-[9.30] referring to T Hickey, ‘Expanding the Use of Prior Act Evidence in Rape and Sexual Assault Cases’ (1993) 29 *Criminal Law Bulletin* 195, 218.

<sup>288</sup> Law Commission (UK), *ibid*, [9.31]-[9.34] referring to Karp ‘Evidence of Propensity and Probability in Sex Offence Cases’ (1994) 70 *Chicago Kent Law Review* 15.

<sup>289</sup> Law Commission (UK), *ibid*, [6.61].

offences. The Commission pointed out that the development of ad hoc exceptions was a ‘slippery slope’ and asked ‘where does one stop?’:

It will be a hard task to explain to the shop owner why the prosecutor cannot put in his shoplifters’ long lists of previous shoplifting offences. It will be a hard task to explain to the householder, or household insurers, why there is no similar exception for the burglar’s record of previous burglaries. It will be equally as hard to explain to the non sexual assault victim why his assailant’s list of previous violent offending cannot be disclosed.<sup>290</sup>

5.4.13 The Commission cautioned that ‘the concession of (perceived) justice to one, but without defensible underlying principle, is a recipe for breeding disrespect for the law. The proper approach is not by ad hoc exceptions. It is by a principled general rule applicable across the board to all offending’.<sup>291</sup> In its Final Report, the Commission gave further consideration to the need for different admissibility rules for sexual offences cases (and particularly child sexual offence cases). This followed the views expressed in submissions received from a clinical and forensic psychologist with considerable court-related experience and from a retired judge. Both advocated separate legislative provisions for sexual cases.<sup>292</sup> Ultimately, the Commission did not recommend any special propensity rules for sexual offences.<sup>293</sup> However, the Commission’s consultations led it to make a far-reaching recommendation in relation to the review of the adversarial trial process. It expressed concern about the conduct of sex offence trials:

We are concerned by the fact that many of those making submissions to us, and especially those who work directly with victims and offenders, are strongly of the view that the current process is both unfair to complainants and frequently fails to hold offenders accountable.<sup>294</sup>

Such matters were beyond its terms of reference and so the Commission recommended that ‘the government should undertake an inquiry into whether the present adversarial trial process should be modified or replaced with some alternative model, either for sex offences or for some wider class of offences’.<sup>295</sup>

5.4.14 Several objections can be raised in relation to removing the admissibility rules that apply to tendency/coincidence evidence. As noted in Part 3, there is long held reluctance in the criminal justice system to admit evidence of other misconduct by the accused. In *Pfennig v The Queen*, McHugh J outlined some of the reasons for this reluctance:

Various reasons have been put forward to justify this exclusion. One reason is that it creates undue suspicion against the accused and undermines the presumption of innocence. Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct. Similarly, “common assumptions about improbabilities of sequences are often wrong”, and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association “is unlikely to be innocent”. Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused. In the present case, for example, once the evidence was admitted, it would require a superhuman effort by the jury to regard the appellant as other than a person of depraved character whose uncorroborated evidence, whether or not he was guilty, could not be acted upon except where it supported the prosecution case. Functional reasons also play a part in excluding evidence of bad character. Trials would be lengthened and expense incurred, often disproportionately so, in

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<sup>290</sup> NZLRC, *Disclosure to Court of Defendants’ Previous Convictions*, Issues Paper 4 (2007) [6.67].

<sup>291</sup> Ibid.

<sup>292</sup> NZLRC, above n 155, [6.70]-[6.72].

<sup>293</sup> Ibid, [6.73].

<sup>294</sup> Ibid, [10.7].

<sup>295</sup> Ibid, recommendation 11.3

litigating the acts of other misconduct; law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter; rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her'.<sup>296</sup>

5.4.15 In relation to the perceived prejudice to the accused, the NZLRC has recognised that the 'received wisdom is uncompromising. Previous convictions are considered to be prejudicial, and (with only very limited exceptions) are to be excluded'.<sup>297</sup> However, the Commission notes that empirical research suggests that this may be too simplistic. In its Final Report, the Commission observed that:

The experience, if not wisdom, of past years should not be jettisoned lightly, particularly where it is protective. However, there is room for a view that the traditional approach, perhaps through years of authoritative repetition, has become too dogmatic. While there is risk in generalisations either way, and it seems likely there is a residue of previous convictions or conduct which will be unacceptably prejudicial, it can be said in the light of research, in Justice William Young's recent words: '...juries appear to take a more conservative approach than has usually been feared to issues such as previous convictions...'.<sup>298</sup>

However, the NZLRC goes on to note that 'previous convictions for offences which the community regards as particularly reprehensible – child sexual abuse is the paradigm – will indeed be gravely prejudicial'.<sup>299</sup> The concern is two fold (1) 'a risk the jury will be "inflamed" against the defendant, and seek to punish the defendant out of dislike; and (2) a risk the jury will give undue weight to the inference of disposition which is available from the previous convictions, and convict on propensity grounds'.<sup>300</sup>

#### Questions

8. Should the special admissibility restrictions that apply for tendency/coincidence be removed, leaving admissibility subject to the rules of relevance and the general discretions to exclude?
9. Should this apply generally? Or is there a place for special classes of offence within which the standard restrictions upon tendency/coincidence evidence do not apply? If so, which offences are within that class and why?
10. If the special admissibility restrictions that apply for tendency/coincidence are removed, should any additional guidance be provided as to how the general discretions to exclude are to be exercised in cases of sexual assault? Or generally?

<sup>296</sup> (1995) 182 CLR 461, 512-513.

<sup>297</sup> NZLRC, above n 290, [7.35].

<sup>298</sup> NZLRC, above n 155, [7.38] quoting Justice William Young 'Summing up to juries in criminal cases: What jury research says about current rules and practice' [2003] *Criminal Law Review* 665, 689.

<sup>299</sup> NZLRC, above n 155, [7.35]. In the Final Report, the Commission observes at [7.42] that 'there seems to be a significant risk of jury animosity towards a man with previous convictions for sexual offences against children.'

<sup>300</sup> NZLRC, above n 290, [7.38]. See also NZLRC, above n 155, [7.40].

## Part 6

# The Impact of Phillips' Case

6.1.1 As stated in Part 1, during the research for this Issues Paper, the Institute identified the High Court decision in *Phillips v The Queen*,<sup>301</sup> as a case that may present significant hurdles for the prosecution in future Tasmanian cases where it seeks to lead evidence from multiple complainants. This case involved the alleged serial 'date' rape of six teenage girls. A key issue at trial was consent – the complainant alleged rape and the accused said that there was consensual sexual intercourse. There was a joint trial and the evidence of each complainant was admitted on the other counts as similar fact evidence. The trial judge ruled that the evidence was cross-admissible on the basis of the improbability of similar lies:

[T]he 'strength of [the] probative value [of the evidence] lies in its ability to demonstrate the improbability of similar lies. That is, one girl might deliberately make up a lie that [the accused] dealt with her sexually without her consent; two might possibly make up a lie to that effect; but the chances or the probability that all six have made up such a lie, in my view, becomes remote in the extreme in the absence of any real risk of concoction.'<sup>302</sup>

6.1.2 The accused was convicted and appealed to the High Court. The High Court allowed the appeal and ordered a separate trial for each complainant. The High Court held that the complainants' evidence was not cross-admissible. This case does not fall directly within the scope of this Issues Paper as the central issues raised by *Phillips* did not involve allegations of concoction. In addition, it was a case that originated in Queensland and so was not decided on the basis of the uniform *Evidence Act* (which applies in Tasmania). However, the Institute's view is that the case is worthy of mention, as it is a High Court decision that limited the cross-admissibility of evidence in a case involving allegations of rape by several complainants. Of particular interest are the High Court's restrictive views about two critical evidentiary principles: (1) relevance; and (2) the probative value of similar fact evidence. The decision in *Phillips* has been controversial and both these aspects of the High Court decision have been the subject of academic criticism.<sup>303</sup>

## 6.2 Relevance

### *The High Court decision*

6.2.1 A key feature of the decision in *Phillips* was that the High Court held that the evidence of the various girls was irrelevant to the issue of consent. As stated, a live issue at trial was whether several of the girls had consented to sex with the accused, and the evidence of the multiple complainants was ruled by the trial judge to be cross-admissible in relation to that issue. The High Court disagreed. The High Court considered that the complainant's lack of consent was a matter that related to the complainant's state of mind and not the accused:

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<sup>301</sup> (2006) 225 CLR 303.

<sup>302</sup> (2006) 225 CLR 303, 316 per the Court quoting the trial judge.

<sup>303</sup> J Gans, above n 146; D Hamer, above n 120; D Hamer, 'Probative but Still Prejudicial? Rethinking Exclusion of Propensity Evidence in Sexual Offence Cases' (paper presented at the Jury Research and Practice Conference, Sydney, 11 December 2007).

It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.<sup>304</sup>

In other words, the High Court considered that consent related to the complainants' state of mind, and had no relevance to whether or not another complainant would consent. It was said to demonstrate 'some "propensity" in particular complainants, but it demonstrates nothing about the appellant'.<sup>305</sup> The 'evidence that five complainants did not consent could not *rationaly* affect the assessment of the probability that a sixth complainant did not consent'.<sup>306</sup>

### ***Criticisms of the Phillips decision***

6.2.2 The High Court ruling that the evidence of multiple complainants was irrelevant to the issue of consent has been criticised. The Court's view was that the fact that one complainant says that she did not consent to sex with the accused does not assist in determining whether another complainant consented. In response, it has been argued that the High Court failed to distinguish between the accused's sex life (in general) and the allegations of rape. This means that in assessing the question of relevance, the Court focused solely on the complainants' state of mind and failed to appreciate the significance of the allegations in terms of what they revealed about the accused. In developing this argument, Gans writes that:

Virtually all of us experience both sexual success and sexual rejection at various times of our life, a fact that reduces the likely meaning of any patterns in such experiences that may arise from time to time. By contrast, most of us get through life without ever being accused of rape, a fact that lends considerable significance to any pattern of such allegations. A person who is accused of rape six times in the space of three years may be the victim of sheer bad luck, but common experience strongly suggests otherwise. Two other explanations are much more cogent. One is that the person is, instead, the victim of a process of concoction, collusion or suggestion that generated the multiple allegations. The other is that it is the complainants who are the victims and the person's propensity to rape that is the common cause of the multiple allegations.<sup>307</sup>

In a similar vein, Wheeler JA observed in *Western Australia v Osborne*,<sup>308</sup> that '[e]ither ... [Phillips] was the unluckiest young man in Australia, the victim of a wildly improbable series of mistaken, or hysterical, or vindictive young women, or alternatively the "improbability of similar lies" was such that all, or most, of the complainants, must have been truthful'.<sup>309</sup>

6.2.3 The significance of the evidence in terms of what it revealed about the accused has also been explored in Hamer's critique of the High Court decision. He writes that:

The common thread is provided by the defendant's behaviour. Asked how they came to have unwanted sexual contact with the defendant, each complainant referred to the defendant's use of threats and force to have sexual contact with women without their consent, and such a disposition is clearly relevant to a particular complainant's non-consent. The line drawn by the Court between the complainants' mental states and the

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<sup>304</sup> (2006) 225 CLR 303, 318.

<sup>305</sup> Ibid, 319.

<sup>306</sup> Ibid (emphasis added).

<sup>307</sup> J Gans, above n 146, 229.

<sup>308</sup> [2007] WASCA 183.

<sup>309</sup> Ibid, [29].

defendant's conduct is false. 'Consent 'is something 'freely and voluntarily given'. It is vitiated by 'force', 'threats or intimidation' and 'fear of bodily harm'.<sup>310</sup>

Hamer says that the relevance of evidence that the accused forced other women to have non-consensual sex with him is what it reveals about the propensity of the accused. It shows 'he has a propensity for forcing women to have non-consensual sex with him, and it increases the probability that the defendant forced the complainant to have non-consensual sex with him.'<sup>311</sup> It shows his 'willingness to persist with sexual penetration over protest, or in the clear absence of consent'.<sup>312</sup>

### ***The potential impact of Phillips in Tasmania***

6.2.4 In Tasmania, as with other jurisdictions, relevance is a fundamental requirement for the admissibility of evidence – evidence that is not relevant is not admissible.<sup>313</sup> This means that evidence that is not relevant cannot be heard in the trial. Relevant evidence is 'evidence that could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in proceedings'.<sup>314</sup> This means that there must be some rational connection between the evidence and the fact in issue that helps determine its existence one way or the other. In *Phillips*, the High Court held that evidence of a complainant of non-consensual sexual intercourse was irrelevant to the issue of consent in relation to another complainant. This is likely to have an impact on the relevance of such evidence in Tasmania. While there is a difference between the common law test of relevance (as applies in Queensland) and the test of relevance in the *Evidence Act 2001*,<sup>315</sup> the wording of the High Court judgment suggests that evidence of multiple complainants may be ruled inadmissible under the *Evidence Act 2001*.<sup>316</sup> In Tasmania, in obiter comments, the High Court's statement has already been cited as authority for the proposition that multiple complaints are not relevant to the issue of consent.<sup>317</sup>

6.2.5 In the application of the decision in *Phillips* to the *Evidence Act 2001*, the Institute's preliminary view is that it is not inevitable that the High Court's ruling on consent will apply. In particular, the Institute considers that the decision's potentially restrictive impact on the issue of consent can be avoided by approaching the evidence of multiple complainants as tendency evidence that reveals the accused's tendency to have sexual intercourse without consent. This is relevant to the circumstances of the sexual intercourse. In *Phillips*, the evidence that the Crown sought to adduce was similar fact evidence that was admitted on the basis of the improbability of similar lies rather than on a propensity basis. This is seen in the summing up of the trial judge that:

But if the accused were to say, 'Yes, I did have sex with all those girls. And I did have sex with all those girls in the same place. And all those similarities exist. But they consented, every time'. In my view there can be no propensity in a situation like that.

<sup>310</sup> D Hamer, above n 120, 616.

<sup>311</sup> Ibid, 638.

<sup>312</sup> *Western Australia v Osborne* [2007] WASCA 183, [29] per Wheeler JA.

<sup>313</sup> *Evidence Act 2001*, s 56(2).

<sup>314</sup> *Evidence Act 2001*, s 55(1).

<sup>315</sup> The *Evidence Act 2001* has adopted a logical/minimal relevance test, this means that there must be some rational connection between the evidence and the fact in issue. This is only part of the common law test. At common law, there is a double component to relevance: the logical relevance test coupled with a legal relevance test. Legal relevance takes into account probative value of the evidence weighed against its potential to confuse the jury, tie up court time, whether its relevance (connection with/impact on a fact-in-issue) is considered to be too remote or tenuous.

<sup>316</sup> In addition, even if the evidence was logically relevant, factors that are relevant to the standard of legal relevance at common law would also be relevant to the test under s 101 *Evidence Act 2001* and to the discretion to exclude evidence under s 137 *Evidence Act 2001*.

<sup>317</sup> *Bellemore v Tasmania* [2006] TASSC 111, [110] per Slicer J.

But the power - the power and strength of the value of those girls' evidence lies in the fact of the substantial improbability that all those girls would willingly ... take part in an act of sexual intercourse and then complain that it was rape.<sup>318</sup>

6.2.6 This approach caused the High Court to focus on the evidence in terms the state of mind of the complainants. However, as pointed out in the academic critique, the evidence does reveal the propensity of the accused to force women to have non-consensual sex. This accords with the approach of Crawford J in *Y* to the evidence of multiple complainants against a single accused.<sup>319</sup> As discussed at [2.3.7], Crawford J's analysis concluded that such evidence should be treated as tendency evidence under the *Evidence Act 2001* s 97 (that is, evidence that the accused had a tendency to behave in a certain way). In Tasmania, rape is a crime where the conduct element consists of two things: (1) sexual intercourse and (2) absence of consent.<sup>320</sup> Although absence of consent is determined by looking at the complainant's state of mind – it is also a 'fact' – the circumstances in which sexual intercourse occurred. In a case where a person says 'I was raped', they are saying that the accused did an act (sexual intercourse) in a particular circumstance (without consent). Applying Crawford J's analysis in *Y* to rape, evidence of several complainants saying that the accused had sexual intercourse without their consent is relevant to prove that the accused has a tendency (pursuant to the *Evidence Act 2001*, s 97)<sup>321</sup> to have sex in such circumstances.

## 6.3 The probative value of similar fact evidence

### *The High Court decision*

6.3.1 After ruling that the evidence was not cross-admissible for the purposes of consent, the High Court asked whether the jury could consider the evidence for some other purpose? For example, was the evidence relevant to the defence of the accused's honest and reasonable mistake in consent? In answering this question, the Court dealt with the rules governing the admissibility of similar fact evidence. The High Court's view was the evidence did not have the high level of probative force for admissibility as similar fact evidence. At common law, the admissibility of similar fact evidence is determined by the strength of its probative force as found in evidence that 'reveals "striking similarities", "unusual features", "underlying unity", "system" or "pattern", such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution'.<sup>322</sup> At trial, the judge had identified the following features of similarity in the various accounts: all the girls were in their early to mid teens, all incidents included penis/vagina intercourse; all girls were within the accused's extended circle of friends'; all the girls would readily have been able to identify the accused and he must have known that; the common thread indicating a preference for consensual sexual intercourse and then little or no hesitation in resorting to the use of force to achieve his ultimate desire when the girl resists.<sup>323</sup> Before the High Court, the

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<sup>318</sup> *Phillips v The Queen* (2006) 225 CLR 303, 316.

<sup>319</sup> [2007] TASSC 112.

<sup>320</sup> The mental element for rape is a voluntary and intentional act of sexual intercourse: *Snow* [1962] TAS SR 271. It is not necessary for the Crown to prove that the accused intended to have sexual intercourse without consent or that the accused knew that there was no consent or was reckless as to whether the other person consented. In other Australian jurisdictions, the mental element for rape differs from Tasmania, see S Bronitt and B McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005) 558 for a summary.

<sup>321</sup> Section 97 provides that evidence is used for a tendency purpose when it is used to prove a person has a particular tendency to act in a particular way or to have a particular state of mind. See [2.3.2].

<sup>322</sup> *Hoch* (1998) 165 CLR 292, 294-295 per Mason CJ, Wilson and Gaudron JJ.

<sup>323</sup> (2006) 225 CLR 303, 312.

Director of Public Prosecution's argument was that 'the conduct alleged on each incident [was] consistent with an overall pattern of conduct by Phillips'.<sup>324</sup> The argument was that:

The present cluster of relevant similarities between each complainant's version becomes compelling not through any unusual hallmark but because, out of all the infinite variety of allegations and descriptions that could be invented, this combination of features of a particular type of sexual assault is repeated by so many different women from within a defined group, but independent of each other.<sup>325</sup>

It was submitted that these features were a 'common "pattern" or "thread"' or a "'combined pattern and flavour'".<sup>326</sup> The Director of Public Prosecution submitted that the accounts, when arranged chronologically, showed an escalation in the planning, confidence and violence in the rapes alleged by the complainants'.<sup>327</sup>

6.3.2 The High Court rejected this argument and held that the evidence did not meet the criteria for similar fact evidence. Its view was that the evidence did not meet the high probative standard required for admissibility as the identified features of the case were not 'striking' but rather, were 'entirely unremarkable':<sup>328</sup>

That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.<sup>329</sup>

The High Court recognised that striking similarity, unusual features, underlying unity, system, pattern or signature were not necessary to admissibility, but considered that 'the high probative value required in order to overcome the prejudicial effect of the evidence was not shown to exist for any other reason'.<sup>330</sup>

### *Criticisms of the Phillips decision*

6.3.3 The strictness of the High Court decision in its application of the similar fact rules has also been critiqued. As stated above, the High Court considered that there was nothing remarkable about the similarities relied upon by the Crown nor did it consider that there was any pattern evident in the accused's behaviour. In relation to this interpretation, it has been argued that High Court failed to appreciate the significance of the evidence. Gans writes that:

A reader could be forgiven for thinking that the pattern of behaviour emerging from the complainants' accounts was merely of a young lad who liked sex, parties and 'degrees of violence ... in some instances'. However, while (violence aside) this might approximate Phillips's own account of his conduct, it bears no relation whatsoever to the complainants' account, where these aspects of his alleged conduct were all unequivocally set-ups or accompaniments to pursuing sex with them whether or not they consented. In this context,

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<sup>324</sup> J Gans, above n 146, 233.

<sup>325</sup> (2006) 225 CLR 303, 320.

<sup>326</sup> Ibid.

<sup>327</sup> J Gans, above n 146, 234.

<sup>328</sup> (2006) 225 CLR 303, 321.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid, 322.

the characterisation of Phillips's alleged conduct as 'entirely unremarkable' is, with respect, remarkably inapposite.<sup>331</sup>

6.3.4 In Hamer's critique, he suggests that the High Court has employed questionable reasoning in describing it as "unremarkable and not uncommon" for a teenage boy to have a "strong desire for sexual intercourse (with consent if he could get it, without it if he could not)" and administering "different degrees of violence" in the process.<sup>332</sup> Contrary to the High Court's view, sexual violence of the kind alleged is remarkable and uncommon. In addition, Hamer highlights the failure of the High Court to have regard to the prosecution argument 'that it was the combination of elements that gave the similar fact evidence its probative value in this case'.<sup>333</sup> He writes that:

[D]espite the lack of a signature, there was considerable similarity between situations: all the women were of a similar age; all were known to the defendant; the assaults all took place on a social occasion; drugs or alcohol had been consumed by most of the women; he engineered opportunities to be alone with them; he sought consensual sex first, but then employed threats and in some cases, violence; he was not deterred by the proximity of other people. Added to this, the very fact that there was not just one, or two but five other women all giving this account suggests strongly that this individual has a strong tendency to behave in this way in this kind of situation.<sup>334</sup>

While acknowledging that there were differences in the assaults, he asserts that these were 'a difference in opportunity rather than a different modus operandi'.<sup>335</sup>

### ***The potential impact in Tasmania***

6.3.5 The view of the Institute is that *Phillips* should not necessarily result in a narrowing of the circumstances/events that fall within the tendency and coincidence provisions in the *Evidence Act 2001*. These provisions differ from the common law requirements. At common law, the test for the admissibility of similar fact evidence is the 'no rational inference' test.<sup>336</sup> Although not essential for admissibility, features that disclose 'striking similarities', 'unusual features', 'underlying unity', 'system', 'pattern' or 'signature' have been identified as satisfying the high probative value required.<sup>337</sup> There is no requirement under the *Evidence Act 2001* for striking similarity etc. As Odgers has commented:

[C]are should be taken in applying common law authorities, relating to 'similar fact' evidence in criminal proceedings, to the test of 'significant probative value'. It is not essential that the evidence reveal 'striking similarities' or 'unusual features'. What is required is a careful assessment of the probative value of the evidence in the context of the issues of the case, and a decision as to whether it is 'significant' or not.<sup>338</sup>

This careful assessment appears to be already occurring in the Tasmanian cases.<sup>339</sup> In any event, in relation to tendency evidence, while the degree of similarity between the incidents has been a factor

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<sup>331</sup> J Gans, above n 146, 234.

<sup>332</sup> D Hamer, above n 120, 627. This view is also expressed by Wheeler JA in *Western Australia v Osborne* [2007] WASCA 183, [35] that the High Court suggestion that it is "entirely unremarkable" for a teenage boy to force sexual penetration upon young girls whom he knows not to be consenting, despite their protests ... is, clearly "remarkable" in any ordinary usage of the word. Most men will never engage in it'.

<sup>333</sup> D Hamer, above n 120, 625.

<sup>334</sup> D Hamer, above n 303.

<sup>335</sup> D Hamer, above n 120, 626.

<sup>336</sup> See [2.3.14] for discussion of common law 'no rational inference' test.

<sup>337</sup> See discussion in *Phillips* (2006) 225 CLR 303, 320-321.

<sup>338</sup> S Odgers, above n 2, [1.3.6680].

<sup>339</sup> See [2.3.4] and [2.3.9]-[2.3.11].

identified as being relevant to the assessment of the probative value for the purposes of *Evidence Act 2001*, s 97,<sup>340</sup> it is only a factor to be taken into account.

6.3.6 In relation to coincidence evidence, s 98(2) provides that the events must be 'substantially and relevantly similar and the circumstances in which they occurred are substantially similar' to qualify as 'related events'. Again, this is different from the common law test. Further, changes to s 98 contained in the *Evidence Amendment Act 2008* (Cth) lower the threshold of similarity required for admissibility. According to the Explanatory Memorandum, the new section 98 'applies where the party adducing the evidence relies on any similarity in the events or the circumstances in which they occurred, or any similarities in both the events and circumstances in which they occurred'.<sup>341</sup>

6.3.7 Nevertheless, the standard for admissibility was set very high in *Phillips*. Hamer has wondered 'what the High Court would have been satisfied with, short of a signature, such as leaving a symbol written in lipstick on the mirror or wearing some eccentric costume'.<sup>342</sup> It may be that the strictness of the finding of the High Court 'that the proffered pattern of date rape behaviour ... could not satisfy any test that demands "high probative quality"'<sup>343</sup> will influence the interpretation of the provisions of the *Evidence Act 2001*. This has occurred in other jurisdictions that have adopted the uniform *Evidence Act*. In the Australian Capital Territory case of *R v Forbes*,<sup>344</sup> an application to sever the trials on the basis that the evidence was not cross-admissible had been rejected. The trial judge re-examined his ruling that the evidence was sufficiently similar in light of the decision in *Phillips*, and 'realised that in giving my earlier ruling I had not subjected the evidence to as rigorous a scrutiny as I should have'.<sup>345</sup> Following this closer scrutiny, the trial judge ruled that separate trials should be held as the probative value of the evidence did not substantially outweigh the prejudicial effect that it may have on the defendant.

#### Questions

11. Do you consider that the decision of the High Court in *Phillips* will impact on the cross-admissibility of evidence from multiple complainants under the *Evidence Act 2001*? If so, how?
12. If the High Court in *Phillips* does restrict the admissibility of coincidence/tendency evidence, do you consider that legislation is necessary to overturn the decision as it applies in Tasmania?

<sup>340</sup> See [2.3.4].

<sup>341</sup> See fn 39. The Parliament of the Commonwealth of Australia, House of Representatives, *Evidence Amendment Bill 2008*, Explanatory Memorandum, 20, <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/64C67B5415D4E4EDCA25745900168A82?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1> (accessed 21 October 2008).

<sup>342</sup> D Hamer, above n 303.

<sup>343</sup> J Gans, above n 146, 244.

<sup>344</sup> [2006] ACTSC 37.

<sup>345</sup> *Ibid*, [3] per Gray J.

# Appendix

Sexual offence cases decided in the Supreme Court of Tasmania concerning s 97, 98 and 101 of the *Evidence Act 2001* (Tas)

	Name	No of counts	No of complainants	Severance?	Nature of evidence
1	S [2004]	2	2	No <u>Basis of application:</u> concoction	Both coincidence and tendency evidence
2	H	17	16	Partial – reduced to 12 C’s <u>Basis of application:</u> not sufficiently probative because of acts and circumstances in which acts occurred. Lack of similarity.	Coincidence evidence
3	L	4	2	No (upheld on appeal) <u>Basis of application:</u> concoction Striking similarity	Coincidence evidence (also tendency evidence)
4	B	2	2	No <u>Basis of application:</u> concoction	Coincidence evidence (Crown initially characterised as tendency evidence).
5	Farmer	28	13	Partial 21 counts involving 9 Cs <u>Basis of application:</u> (1) Concoction (rejected) (2) fair trial (partially successful)	Coincidence (SFE)
6	S [2005]	14	4	Partial <u>Basis of application:</u> Contamination (rejected) Similarity (upheld)	Coincidence and tendency evidence
7	E	6	6	Partial <u>Basis of application:</u> (1) related events (upheld) (2)concoction/contamination (rejected)	Coincidence evidence
8	Bellemore	5	5	Partial (upheld on appeal) <u>Basis of application:</u> (1) Contamination (successful in regard to W and separate trial ordered). (2) substantially similar (rejected)	Coincidence evidence

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9	S		3	Crown not join as not similar enough – note that one case jury found NG, one case guilty and then successful appeal on basis of evidence incorrectly admitted S [2005] TASSC 110 and third case the C not want to give evidence.	n/a
10	H	3	3	Partial – reduced to 2 C's. Not proceed against other case. Convicted one count and acquitted on the other – sentence 13 May 2005.  Appears that argued concoction and also specific count with general counts of maintaining sexual relationship under s 125A.  Concoction basis not upheld but specific/general upheld as well as different issues involved (consent was relevant to the severed count but not the other 2).	Coincidence evidence
11	Y	7	6	No <u>Basis of application:</u> concoction	Tendency evidence
12	Outtram	2	2	No (upheld on appeal) <u>Basis of application:</u> similarity	Tendency and coincidence evidence
13	Ferguson	3	3	Partial – reduced to 2 C's. <u>Basis of application:</u> concoction and similarity of circumstances  Successfully on basis of similarity of circumstances	Coincidence evidence
14	Coy	4	4	No application to sever Basis of defence at trial was concoction	Tendency evidence
15	D	5	5	Partial – reduced to 4 C's <u>Basis of application:</u> concoction and similarity  Successful on basis of similarity of circumstances	Coincidence evidence
16	M	2	2	Not joined by Crown  One of the C's gave evidence at her own trial and at the trial of the other C.	n/a
17	E	9	8	No application to sever Self-represented at trial	unknown