

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***

FINAL REPORT NO 16

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## **Background to this Report**

This Report makes recommendations in relation to the conduct of trials in sexual offences cases where an accused is charged with offences against several complainants. The project was referred from the Board of the Tasmania Law Reform Institute and was approved on 21 November 2006. The publication of this Report is made following consultation with the public and participants in the criminal justice system. The consultation was performed by the release of an Issues Paper on this topic in September 2009. The Issues Paper addressed two main 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 concerned 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. Specifically, the Issues Paper considered the relevance of the possibility of collusion/concoction or other influence on the admissibility of a complainant's evidence as tendency/coincidence evidence. Several options for reform were discussed in the Issues Paper:

- Option 1 – No change to the current law. This would mean that the reasonable possibility of concoction would continue to be a matter relevant to the admissibility of tendency/coincidence evidence;
- Option 2 – Amend the current law to make the possibility of concoction a matter for the jury;
- Option 3 – Amend the current 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;
- Option 4 – Remove special admissibility restrictions for tendency/coincidence evidence so that the evidence would be admissible if relevant and subject to a general discretion to exclude.

Responses to the Issues Paper were received from:

1. Mr M Brazendale, Acting Assistant Commissioner of Police Planning and Development;
2. Mr T J Ellis SC, Director of Public Prosecutions (Tas);
3. Mr D G Coates SC, Assistant Director of Public Prosecutions (Tas);
4. Mr G Davis, Manager of the Director of Public Prosecutions Serious Crime Witness Assistance Unit (Tas);
5. Mr P Mason, the former Commissioner for Children (Tas);
6. Mr N Chisnall, Assistant Crown Counsel (NZ);
7. Mr N R Cowdrey AM QC, Director of Public Prosecutions (NSW);
8. Sexual Assault Support Service (Tas) (oral submission).

In the preparation of this Report detailed consideration has been given to all responses. The Institute thanks these people for taking the time and effort to respond.

## **Acknowledgments**

This Report was prepared by Dr Rebecca Bradfield and Ms Terese Henning.

The Institute would like to acknowledge and thank the Office of the Director of Public Prosecutions, in particular Mr Mike Stoddart, Principal Crown Counsel. In addition, the Institute would like to thank Tasmania Police for their assistance, in particular Commander Cerritelli and Detective Inspector Plumpton. Valuable preliminary research was conducted by Ms Phillipa Dixon and Ms Lucy de Vreeze. The Institute also thanks Mr Bruce Newey for his editorial work.

## **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).

## **Recommendations**

### **Recommendation 1**

The law in relation to concoction/contamination and tendency and coincidence evidence contained in the *Evidence Act 2001* ss 97, 98 and 101 should be reformed.

### **Recommendation 2**

The *Evidence Act 2001* should be amended to provide that, in sexual assault proceedings, tendency or coincidence evidence is not to be ruled inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.<sup>1</sup>

### **Recommendation 3**

The *Criminal Code* should be amended to:

- (a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and
- (b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible in relation to another charge.<sup>2</sup>

### **Recommendation 4**

The rules of tendency and coincidence evidence contained in the *Evidence Act 2001*, ss 97, 98 and 101 should not be removed for sexual offences.

### **Recommendation 5**

The *Evidence Act 2001*, s 55 should be amended to specify that in a trial of two or more charges of sexual crimes, when consent is in issue, evidence may be admitted under the *Evidence Act 2001*, s 97 of a tendency of the accused: (a) to procure participation in sexual acts by force, threats or intimidation; or (b) to engage in sexual acts without an honest and reasonable belief that the sexual acts were consented to.

### **Recommendation 6**

The *Evidence Act 2001*, ss 97, 98 and 101 should be amended to specify that in prosecutions for sexual crimes a court is not to rule that evidence the prosecution seeks to adduce under those sections is inadmissible on the basis that the evidence does not have ‘striking similarities’ with other evidence about the sexual conduct of the defendant.<sup>3</sup>

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<sup>1</sup> The wording of this Recommendation is based on Australian Law Reform Commission and New South Wales Law Reform Commission (ALRC/NSWLRC), *Family Violence – A National Legal Response*, ALRC Final Report No 114, (2010) Recommendation 27-13.

<sup>2</sup> The wording of this Recommendation is based on ALRC/NSWLRC Recommendation 26-5. See ALRC/NSWLRC, *ibid*.

<sup>3</sup> The recommendation suggested by Cossins (detailed at [6.3.10]) may provide a guide for the wording of the legislative reform. See A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee, University of New South Wales, 2010).



# Part 1

## Introduction

### 1.1 Background

1.1.1 This Report 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* (Tas), 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>4</sup>

1.1.2 The problems that arise in this area are created by the restrictions that ss 97-101 of the *Evidence Act 2001* (Tas) 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>5</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 their allegations against the accused or whether they have been prompted or influenced in some other way to invent allegations against the accused.<sup>6</sup>

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<sup>4</sup> *De Jesus v R* (1986) 61 ALJR 1.

<sup>5</sup> While this Report 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*, (Thomson Reuters Australia, 9<sup>th</sup> ed, 2010) [1.3.6740]. See also J Anderson, N Williams and L Clegg, *The New Law of Evidence* (LexisNexis Butterworths, 2009) [95.00]-[95.05].

<sup>6</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.

*1.1.3* In this Report, the Institute’s view is 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>7</sup> which was adopted by the Tasmanian Supreme Court in *Tasmania v S*<sup>8</sup> and *Tasmania v L*,<sup>9</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. The Institute’s view is that the current balance is not 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 contains recommendations for reform.

*1.1.5* During research for this project, the Institute identified the High Court decision in *Phillips v The Queen*,<sup>10</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, the implications for the development of the law in Tasmania and recommendations for reform are explored in Part 6.

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<sup>7</sup> (2003) 58 NSWLR 700.

<sup>8</sup> [2004] TASSC 84.

<sup>9</sup> [2006] TASSC 59.

<sup>10</sup> (2006) 225 CLR 303.

## Part 2

# The Current Law in Tasmania

**2.1.1** As set out in Part 1, this Report 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 Report in considering the current law is the relevance of concoction and similar factors to these rules, in particular, the extent to which the common law principles set out in *Pfenning v The Queen*<sup>11</sup> and *Hoch v The Queen*<sup>12</sup> still apply to the *Evidence Act 2001* (Tas), ss 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 offence 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 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

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<sup>11</sup> (1995) 182 CLR 461.

<sup>12</sup> (1988) 165 CLR 292.

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>13</sup> In *De Jesus v R*,<sup>14</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 (Tas)*

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 to act in a particular way or to have a particular state of mind.<sup>15</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>16</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* (Tas), 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>17</sup> Tendency evidence is only admissible if it has significant probative value.<sup>18</sup> ‘Significant probative value’ is not defined in the *Evidence Act 2001* (Tas). 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>19</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 force in this regard must be significant. It is ‘more than merely relevant, but may be less than ‘substantially so’.<sup>20</sup> Significant relevance has been expressed in some cases as meaning that the evidence must be ‘important’ or ‘of consequence’<sup>21</sup> in establishing the facts to be proved.

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<sup>13</sup> *Tasmania v S* [2004] TASSC 8, [3] (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>14</sup> (1986) 61 ALJR 1; *Hoch* (1988) 165 CLR 292, 294.

<sup>15</sup> *Evidence Act 2001* (Tas), s 97(1), s 3(1).

<sup>16</sup> Criminal Justice Sexual Offences Taskforce, Attorney General’s Department of New South Wales, *Responding to Sexual Assault: The Way Forward* (2005) 73.

<sup>17</sup> *Evidence Act 2001* (Tas), s 97(1).

<sup>18</sup> *Ibid* s 97(1)(b).

<sup>19</sup> *Ibid* s 3(1).

<sup>20</sup> *AW v The Queen* [2009] NSWCCA 1.

<sup>21</sup> *R v Lockyer* (1996) 89 A Crim R 457.

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>22</sup>

- (1) the real chance of concoction by complainants;<sup>23</sup>
- (2) the number of incidents establishing tendency;<sup>24</sup>
- (3) the degree of similarity between the incidents;<sup>25</sup>
- (4) the other evidence in the case that has been or will be adduced.<sup>26</sup>

These factors were identified in *Tasmania v Y*,<sup>27</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* (Tas), 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>28</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>29</sup>

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<sup>22</sup> This list is adapted from Anderson, Williams and Clegg, above n 5 [97.17]. 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>23</sup> See *Tasmania v Y* [2007] TASSC 112.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid; *Outram v Tasmania* [2007] TASSC 98.

<sup>26</sup> See *Tasmania v Y* [2007] TASSC 112; *Chatters v R* [2005] TASSC 42.

<sup>27</sup> [2007] TASSC 112.

<sup>28</sup> It is noted that substantial and relevant similarity and substantially similar circumstances are not legislative requirements for s 97 (tendency evidence). They were requirements for coincidence evidence under the former s 98. See further at fn 31.

<sup>29</sup> [2007] TASSC 112, [39] (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>30</sup> The *Evidence Act 2001* (Tas), s 98 sets out the coincidence rule:

- 98 (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless –
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and
  - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.<sup>31</sup>

Coincidence evidence will generally be used in one of two situations: (1) where there are at least two events, 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* (Tas), coincidence evidence from multiple complainants was relied upon in *Outram v Tasmania*,<sup>32</sup> *Tasmania v E*,<sup>33</sup> *Bellemore v Tasmania*,<sup>34</sup> *Tasmania v L*,<sup>35</sup> *Tasmania v B*,<sup>36</sup> *Tasmania v S*,<sup>37</sup> *Tasmania v Farmer*,<sup>38</sup> *R v S*,<sup>39</sup> and *Tasmania v H*.<sup>40</sup> Such evidence has been admitted on the basis of the improbability of similar lies, such as in *Tasmania v E*, where Crawford J 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>41</sup>

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<sup>30</sup> Australian Law Reform Commission (ALRC), *Review of the Evidence Act 1995*, Issues Paper No 28 (2004) 8.14; Anderson, Williams and Clegg, above n 5 [98.3].

<sup>31</sup> Section 98 was amended by the *Evidence Amendment Act 2010* which removed the requirement for ‘related events’ and both ‘substantial and relevant similarities in the events’ and ‘substantial similarity’ in circumstances. This followed recommendations in the ALRC, *Uniform Evidence Law*, Report 102 (2006) based on the view that ‘to require both a striking similarity of events and a striking similarity of circumstances would be to raise the threshold too high and would be likely to exclude highly probative evidence’, [11.24].

<sup>32</sup> [2007] TASSC 98.

<sup>33</sup> [2007] TASSC 38.

<sup>34</sup> [2006] TASSC 111.

<sup>35</sup> [2004] TASSC 86, [2006] TASSC 59.

<sup>36</sup> [2006] TASSC 110.

<sup>37</sup> [2004] TASSC 84.

<sup>38</sup> [2004] TASSC 104.

<sup>39</sup> [2005] TASSC 18.

<sup>40</sup> (Unreported, TASSC, Blow J, 11 October 2005).

<sup>41</sup> *Tasmania v E* [2007] TASSC 38, [2]. For example, Odgers has suggested that a basis for the admission of coincidence evidence under the uniform *Evidence Acts* is that the ‘similarities between the accounts of two or

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 witnesses are telling the truth. This draws upon the approach of the common law in *Hoch*.<sup>42</sup> Since the decision in *Y*,<sup>43</sup> it appears that evidence of multiple complainants against a single accused (where the probative value of the evidence is the improbability of two or more witnesses independently coming forward with such evidence unless it had foundation in fact) 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.<sup>44</sup>

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 events;
- (3) that there are similarities in the events or that there are similarities in the circumstances in which they occurred or there are similarities in both the events and circumstances.

2.3.9 The revised s 98 expands the operation of the coincidence evidence provisions as it no longer requires that the events be ‘substantially and relevantly similar’ and the circumstances be ‘substantially similar’. However, a consideration of three Tasmanian cases decided on the basis of the original provision indicates the types of facts that have been held to demonstrate the requirement of similarity. In *Bellemore v Tasmania*,<sup>45</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.

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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 5, [1.3.6880].

<sup>42</sup> (1988) 165 CLR 292.

<sup>43</sup> [2007] TASSC 112.

<sup>44</sup> In *Tasmania v Y* [2007] TASSC 112, Crawford J expressed the view that two examples of the application of section 98 were ‘a case in which there is evidence of more than one crime having been committed in a distinctly similar ways and circumstances, so that proof beyond reasonable doubt that the accused committed one of them could be used to prove that he committed the others and to exclude mere coincidence as an explanation’ and ‘a case in which there is evidence that a number of crimes have been committed in distinctly similar ways and circumstances and there is evidence linking the accused to them all, giving rise to an argument that it is more than mere coincidence that he is linked to them and that he is in fact guilty of them all’. Crawford J’s view was the section 98 did not apply to cases where the Crown relies on the improbability of similar allegations by several witnesses unless they are all true (the *Hoch* type case). In contrast, the approach in New South Wales and Victoria has been to use such evidence for both a tendency and coincidence purpose. See Director of Public Prosecutions (Vic), *Director’s Policy no 33: Tendency and coincidence evidence*, 9-10, <<http://www.opp.vic.gov.au>>. See also Odgers, above n 5, [1.3.6880] and [1.3.7300]. Odgers writes that ‘the definition of “coincidence evidence” in s 98 should be understood to apply to the kind of credibility reasoning dealt with under the common law in *Boardman* and *Hoch*. Intermediate courts of appeal have generally proceeded on that assumption’, Odgers, above n 5, [1.3.7300].

<sup>45</sup> [2006] TASSC 111.

2.3.10 In *Tasmania v B*,<sup>46</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;
- 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>47</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 In *Tasmania v McLean*,<sup>48</sup> the facts relied upon to establish similarity were:

- the girls were of similar age;
- they were both employees of the accused;
- they both told of conversations concerning intimate details of the accused’s personal life, in particular his marital situation;
- there was discussion about the girls’ virginity; in particular, there was similarity in the manner in which the accused spoke to AB immediately before the first act of sexual intercourse, and the way in which he spoke to SO about losing her virginity to him;
- the accused took both girls home after work and for rides on his motorcycle;
- the acts of sexual intercourse with AB in the flat above the coffee shop, in the accused’s car, and in the room behind the shop; which can be compared with the accused attempting to initiate sexual contact with SO in his car, putting his hand on her leg in the shop, telling SO

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<sup>46</sup> [2006] TASSC 110.

<sup>47</sup> [2006] TASSC 59.

<sup>48</sup> [2008] TASSC 57.

that there was the room at the back of the shop where they could have sexual intercourse, and initiating sexual activity with SO on the bed upstairs.

- the accused took both girls to the upstairs flat and supplied them with alcohol, albeit that in the case of SO she was in the company of another girl at the time.

**2.3.13** If the evidence qualifies as coincidence evidence, it will only be admissible if it has significant probative value. 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>49</sup>

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

**2.3.14** 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* (Tas). Prejudice ‘includes the risk that evidence will be given 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>50</sup> In *HML v R*,<sup>51</sup> Gleeson CJ stated that ‘prejudice means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate’.<sup>52</sup>

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

**2.3.15** The *Evidence Act 2001* (Tas), s 101 represents a departure from the previous common law position. Prior to the enactment of the *Evidence Act 2001* (Tas), 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>53</sup> adopted a ‘no rational inference test’ for the admission of such evidence:

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<sup>49</sup> See [2.3.3].

<sup>50</sup> Anderson, Williams and Clegg, above n 5 [101.3] 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 (Mason CJ, Deane and Dawson JJ at 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>51</sup> (2008) 245 ALR 204.

<sup>52</sup> (2008) 245 ALR 204 [12].

<sup>53</sup> (1988) 165 CLR 292.

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>54</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>55</sup> and *Phillips v The Queen*.<sup>56</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>57</sup>

**2.3.16** The *Evidence Act 2001* (Tas), s 101 has been interpreted as not incorporating the common law ‘no rational inference test’.<sup>58</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>59</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>60</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>61</sup> and has been applied in subsequent cases.<sup>62</sup>

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

**2.3.17** 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>63</sup> It is not sufficient if concoction is merely a fanciful possibility. Case law accepts that it is not sufficient if the complainants merely know each other and have discussed the alleged offences, there must be something more,<sup>64</sup> for example, evidence of motive.<sup>65</sup> However, there

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<sup>54</sup> *Ibid*, 296 (Mason CJ, Wilson and Gaudron JJ).

<sup>55</sup> (1995) 182 CLR 461.

<sup>56</sup> (2006) 225 CLR 303.

<sup>57</sup> (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ).

<sup>58</sup> *R v Ellis* (2003) 58 NSWLR 700.

<sup>59</sup> (2003) 58 NSWLR 700.

<sup>60</sup> *Ibid*, [95] (Spigelman CJ). His Honour accepted that there may be cases where ‘the stringency of the approach, culminating in the *Pfennig* test’ is appropriate, at [96].

<sup>61</sup> [2004] TASSC 84.

<sup>62</sup> *See v Tasmania* (2006) 15 Tas R 381; *Tasmania v B* [2006] TASSC 110; *Tasmania v Y* [2007] TASSC 112.

<sup>63</sup> *Hickey v R* (2002) 136 A Crim R 151, 155 (Templeman J).

<sup>64</sup> *Ibid*. This was approved in Tasmania in *Tasmania v S* [2004] TASSC 84.

<sup>65</sup> For example, evidence that the complainants hated or felt antipathy towards the accused.

are indications in Tasmania that mere association and the opportunity to discuss is enough to raise a real possibility of contamination of the evidence.<sup>66</sup>

**2.3.18** A key issue in this Report is the relevance of concoction or other influence to the *Evidence Act 2001* (Tas), ss 97, 98 and 101. Logically the ‘no rational inference’ test set out in *Hoch/Pfennig* should not apply to the provisions in the *Evidence Act 2001* (Tas).<sup>67</sup> However, following the decision in *Tasmania v S*,<sup>68</sup> the possibility of concoction continues to be central to the admissibility of tendency and coincidence evidence under the *Evidence Act 2001* (Tas).

**2.3.19** The New South Wales Court of Criminal Appeal stated in *R v Ellis*,<sup>69</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>70</sup> It was observed that the ‘no rational explanation test’ was the test developed by the common law to determine when the probative force of the similar fact evidence justified its admission despite its prejudicial effect. At common law, it is only if there is no rational view of the evidence consistent with the innocence of the accused that similar fact evidence is admissible.<sup>71</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>72</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. However, Spigelman J (without specifying the cases in which it would be appropriate) left open the possibility that the application of the *Pfennig* test may be appropriate in some cases.<sup>73</sup>

**2.3.20** The Institute’s view is that an application of the decision in *Ellis*<sup>74</sup> (that the ‘no rational inference’ test generally does not apply to the provisions in the *Evidence Act 2001* (Tas)) 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

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<sup>66</sup> See the ruling of Crawford CJ in *H* discussed at [2.3.24], [3.2.3] – [3.2.5].

<sup>67</sup> See [2.3.18]-[2.3.20].

<sup>68</sup> [2004] TASSC 84.

<sup>69</sup> (2003) 58 NSWLR 700.

<sup>70</sup> *Ibid*, 716-717 (Spigelman CJ).

<sup>71</sup> *Pfennig* (1995) 182 CLR 461, 438 (Mason CJ, Deane and Gaudron JJ).

<sup>72</sup> *Ibid*, 516 (McHugh J).

<sup>73</sup> (2003) 58 NSWLR 700, 718

<sup>74</sup> (2003) 58 NSWLR 700.

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>75</sup>

2.3.21 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.

2.3.22 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 ss 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>76</sup> If there was a reasonable possibility of concoction, this deprived the evidence of its significant probative value.<sup>77</sup> Further, Underwood CJ held that concoction applied to the balancing of probative value and prejudicial effect required in s 101(2).<sup>78</sup>

2.3.23 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>79</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>80</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>81</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>75</sup> [2004] TASSC 84.

<sup>76</sup> (2006) 15 Tas R 381, [8].

<sup>77</sup> Ibid, citing *R v Colby* [1999] NSWCCA 261, [107] (Mason P).

<sup>78</sup> If there is a real chance of concoction, evidence is excluded under s 101(2), see Anderson, Williams and Clegg, above n 5, 97.17 fn 146, 98.9 fn 200.

<sup>79</sup> *R v OGD (No 2)* [2000] NSWCCA 404, [77] (Simpson J), (emphasis added).

<sup>80</sup> [2004] TASSC 84, [10]. This is no longer correct in relation to the determination of whether the probative value outweighs its prejudicial effect for the purposes of the *Evidence Act 2001* (Tas), s 137. See *J v Tasmania* [2011] TASCCA 7 discussed at [5.1.3].

<sup>81</sup> Ibid, [11].

2.3.24 The approach of Underwood J in *S* was accepted as correct by the Court of Criminal Appeal in *L v Tasmania*.<sup>82</sup> It has been applied in several other cases, including *Tasmania v B*<sup>83</sup> and *Tasmania v Y*.<sup>84</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>85</sup>

In *H*'s case, Crawford CJ ruled that the opportunity to discuss the allegations of sexual abuse while the complainants were children (this was denied by the complainants as adult witnesses) meant that there was a ‘real possibility of contamination’.<sup>86</sup> In *Tasmania v McLean*,<sup>87</sup> in relation to whether the probative value of the evidence outweighs its prejudicial effect, Porter J stated that ‘subsumed within ... [that] question is the determination of whether or not there is a reasonable possibility of concoction or collusion’.<sup>88</sup> His Honour considered that the cases of *L v Tasmania*,<sup>89</sup> *R v OGD (No 2)*,<sup>90</sup> and *Tasmania v Farmer*,<sup>91</sup> made it clear that ‘the *Hoch* considerations apply to the exercise to be carried out by the court in a determination under the Act, s 97’.<sup>92</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* (Tas), ss 97, 98 and 101. This means that the possibility of concoction/contamination, if a finding is made that there is a reasonable possibility, weighs so heavily in the balance that it appears automatically to require the exclusion of the evidence. The Director of Prosecutions (Tas), in his submission, agreed with this interpretation of the Tasmanian approach.

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<sup>82</sup> [2006] TASSC 59.

<sup>83</sup> [2006] TASSC 110.

<sup>84</sup> [2007] TASSC 112.

<sup>85</sup> *Bellemore v Tasmania* [2006] TASSC 111, [21] (Crawford J referring to the ruling of the trial judge).

<sup>86</sup> Ruling of Crawford CJ, 20 July 2009.

<sup>87</sup> [2008] TASSC 57.

<sup>88</sup> *Ibid* [7].

<sup>89</sup> (2006) 15 Tas R 381.

<sup>90</sup> (2000) 50 NSWLR 433.

<sup>91</sup> (2004) 148 A Crim R 99.

<sup>92</sup> [2008] TASSC 57, [8].

## 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 potential dangers posed to the accused where the evidence of multiple complainants is cross-admissible. In addition, this part examines the need to strike an appropriate balance between the rights of the accused, and the interests of the prosecution, the complainant and the community.

### **3.2 The Tasmanian context**

**3.2.1** Since the commencement of the *Evidence Act 2001* (Tas), the Institute has identified 20 trials where a single accused was charged with sexual offences against multiple complainants.<sup>93</sup> In 18 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>94</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 14 of the 16 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 three of these cases.<sup>95</sup> In another three of the 14 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>96</sup> The other major argument advanced in support of applications to sever trials (in 11 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 seven of the 11 cases in which it was raised. In a further case, there was only one complainant and the Crown sought to adduce evidence from another witness as tendency evidence.<sup>97</sup> Counsel for the accused argued the evidence should not be admissible on the basis of lack of similarity and concoction/contamination. This argument was not successful, and the trial judge ruled that the evidence was admissible as tendency evidence.

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<sup>93</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>94</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>95</sup> *Bellemore v Tasmania* [2006] TASSC 111; *H*, ruling of Crawford CJ, 20 July 2009; *F*, ruling of Crawford CJ, 13 May 2008.

<sup>96</sup> *Outram v Tasmania* [2007] TASSC 98; *Bellemore v Tasmania* [2006] TASSC 111; *L v Tasmania* [2006] TASSC 59.

<sup>97</sup> *Tasmania v McLean* [2008] TASSC 57.

3.2.2 In the Issues Paper, the Institute wrote that 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 wrote that this indicates that judges in Tasmania do not automatically find concoction from the mere association of the complainants and that they scrutinise the evidence with care to determine whether there is a reasonable foundation for the suggestion of concoction. However, since the publication of the Issues Paper, the Director of Public Prosecutions has referred the Institute to the decision in *H* where Crawford CJ ruled that association and the passage of time created a real (even though unlikely) possibility of concoction.

3.2.3 In *H*'s case, the accused was charged with two counts of maintaining a sexual relationship with a young person under the age of 17 years. The alleged sexual abuse had occurred between 25 and 35 years prior to proceedings being brought. The two complainants were siblings, and the Crown joined the complaints in the same indictment. The Crown also sought to adduce evidence of another sibling in relation to whom the accused had pleaded guilty to an offence involving sexual assault in 1983. Defence counsel made an application to sever the indictment and sought a ruling that the evidence of the complainants was not cross admissible as tendency and coincidence evidence on the basis of concoction/contamination. The Director of Public Prosecutions' submission summarised the evidence given on the voir dire and Crawford J's ruling:

Crawford CJ found that (as had been conceded) there were such similarities between the siblings' versions of events as to make coincidence unlikely and to give their evidence significant probative value. He found '*positively*' that '*throughout their adult life, there were no communications between the siblings, or between them and their mother, about the details of what the accused did to them. I have no reason to doubt their assurances about that, for they were impressive witnesses so far as an appearance of honesty is concerned.*'

B, C and D all said they had no communications between themselves or with their mother (apart from D's disclosure to her mother) when they were children about the details of what A did to them, and Crawford CJ said '*I believed them when they said they have no memory of such conversations*'. In fact, they denied any such conversations.

There were thus three impressive witnesses, whose honesty was not doubted, who said there had been no communications between them as children or adults of any detail of what A had done to them before they made police statements concerning such details in which a pattern of significant similarities emerged. His Honour also found there was '*no real possibility that the siblings have deliberately concocted their evidence*'.

Notwithstanding all that, His Honour ruled on 20 July 2009 in a reserved ruling that it was a '*real possibility, but nevertheless, an unlikely one*' '*that the allegations of either or both of B and C are based on false memories brought about by conversations they had with each other, D or their mother, when they were children*'.

His Honour thought he was therefore '*bound*' to be '*led to the conclusion that although the evidence in question has significant probative value ... that probative value is not sufficiently significant as to outweigh any prejudicial effect*'. Accordingly, the indictment was severed and the siblings' evidence was not allowed to be led as tendency (or presumably, coincidence) evidence at the trial of their charge concerning B or C.

#### 3.2.4 The Director then writes that:

Although as the Issues Paper at 2.3.16 says, citing *Tasmania v S* supra, 'It is not sufficient if the complainants merely know each other and have discussed the alleged offences. There must be something more', with respect to Crawford CJ it is difficult to see what 'more' there was. On this ruling, it is difficult to see how the evidence of complainants in the same family of sexual assaults on them would ever be cross-admissible, as a trial judge can think there is realistic possibility of contamination even if the complainants deny it happened, and are believed to be honest, and there is no evidence at all that it did. The possibility seems to arise from opportunity. In the ruling above discussed, the most explicable passage in which His Honour put the basis of his suspicion was this:

*‘I believed them when they said that they have no memory of such conversations, but the passage of time is a long one and I doubt that they can accurately recall that there were in fact no communications of detail between them when they were aged about 15, 13 and 9 respectively. They had the opportunity for such communications at that time and they all believed then that the others had been sexually assaulted. Childhood and the passage of time may well have dimmed their memories concerning conversations during their childhood’.*

3.2.5 The case in relation to one of the complainants proceeded to trial where (in the Director’s submission), the complainant ‘gave evidence in an impressive way but so too, it could fairly be said, did the accused’. The jury returned a not guilty verdict in ‘little time’. The Director postulates that the ‘result of a trial with the siblings’ evidence available may have been quite different: undoubtedly and at the least the time for deliberation would have been longer’. This reflects the findings of empirical research that suggest that separate trials are associated with low conviction rates.<sup>98</sup>

3.2.6 In the case of *F*,<sup>99</sup> the Crown had joined counts relating to four complainants in a single indictment against a single accused, the grandfather of the complainants. The accused made an application for severance on the basis that the evidence of the complainants was not cross-admissible as tendency and coincidence evidence due to lack of similarity (relating to one complainant) and concoction (the remaining three). The accused had already entered a plea of guilty to two counts of indecent assault against one of the complainants. All complainants gave evidence on the voir dire, and evidence was given that three of the girls had discussed the accused’s conduct but had not discussed the details of the allegations. A family meeting had also been held when the accused’s conduct was discussed in general terms. The other complainant was too young to be involved in any discussions. In ruling that the trials should be severed, Crawford CJ stated that ‘the test that I will apply is that there should be no reasonable possibility of concoction or contamination’. His Honour stated that:

That doesn’t mean that I need to be satisfied that they probably did talk about it or that they find that definitely did talk about it or anything like that. It’s only the question of whether it’s reasonably possible, that there was some concoction or contamination resulting from discussions between the girls.

In applying this to the case, his Honour stated that ‘I can’t say that I find that [the three complainants] did anymore than they admitted to but it’s certainly a real possibility and for that reason I am of the view that the evidence of one should not be cross-admissible on the trial concerning one of the others’. Again, it is hard to see what ‘more’ there was in this case, as the girls admitted discussing the allegations in general terms but did not discuss details of the accused’s conduct. In relation to the remaining complainant, Crawford CJ ruled that there was ‘not strikingly similar features’ as the counts concerning her only involved touching the vagina (and not nipples or exposure of the accused’s penis).

3.2.7 Following the severance ruling, the Crown entered a nolle prosequi in relation to the counts that were not strikingly similar (this complainant was four at the time of the ruling) and the accused entered a plea of guilty in relation to the count concerning another of the complainants. The charges relating to the final complainant proceeded to trial and the accused was found guilty. At trial, the complainant was cross-examined about inconsistencies with the evidence she gave on the voir dire. She was also cross-examined about the number of other granddaughters who had visited/been visited by her grandfather.

3.2.8 An examination of the Tasmanian cases highlights a further difficulty with the operation of the law in this area, namely the requirement for complainants to testify on numerous occasions. In 15 of the 16 cases where the application to sever was made, the complainants were required to give evidence on the voir dire (in relation to the severance application), and then again at trial (if a trial was

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<sup>98</sup> See [3.3.13].

<sup>99</sup> Ruling of Crawford CJ, 13 May 2008.

held). Extreme examples of this occurred in the cases of the *Bellemore*<sup>100</sup> and *Ferguson*,<sup>101</sup> where some of the complainants were required to give evidence eight times.<sup>102</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>103</sup>

3.2.9 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>104</sup> Defence counsel has 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>105</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>106</sup>

3.2.10 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>107</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

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<sup>100</sup> *Bellemore v Tasmania* [2006] TASSC 111.

<sup>101</sup> Sentenced, 15 May 2007, Crawford J.

<sup>102</sup> Information provided by personal correspondence with Michael Stoddart, Office of the DPP.

<sup>103</sup> *Outram v Tasmania* [2007] TASSC 98.

<sup>104</sup> K Crispin QC cited in J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice* (Butterworths, 1995) 175.

<sup>105</sup> G Dalpont, *Lawyer’s Professional Responsibility* (Lawbook Co, 2006) [18.85]. See also R Boyd and A Hopkins, ‘Cross-examination of child sexual assault complainants: Concerns about the application of s 41 of the Evidence Act’ (2010) 34 *Criminal Law Journal* 149.

<sup>106</sup> See C Taylor’s comments in relation to cross-examination at committal, C Taylor, *Surviving the Legal System* (Coulomb Communications, 2004) 77.

<sup>107</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.

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>108</sup>

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>109</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. This view was supported by the Manager of the Director of Public Prosecutions Serious Crime Witness Assistance Unit who wrote that that the use of voir dires appears to be ‘to “fish” for inconsistencies about minor points and secondary details’.

**3.2.11** In its 2010 consideration of the rules of evidence and procedure that apply in sexual assault proceedings, the ALRC/NSWLRC agreed with the ACT review that there is ‘little or no benefit in requiring that complainants give evidence twice’<sup>110</sup> and that child complainants in sexual offence proceedings should not be required to attend committal hearings in person and adult complainants should only be required to attend if there are special reasons.<sup>111</sup> In Tasmania, the ability of the accused to question a complainant in preliminary proceedings is confined to ‘exceptional circumstances’.<sup>112</sup> A preliminary proceeding is the equivalent of a committal hearing in the Magistrates’ Court where an accused can apply for an order that named witnesses give evidence on oath.<sup>113</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>114</sup> Such reforms are

<sup>108</sup> C Taylor, above n 106, 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, 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: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (Peter Lang Publishing, 2004) Chapter 7.

<sup>109</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 Freckleton, ‘Sexual offences prosecutions: a barrister’s perspective’ in P Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 145; C Taylor, above n 106, 133-140.

<sup>110</sup> Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to sexual assault: The challenge of change* (2005), 130 cited in ALRC, above n 124 [17.93]

<sup>111</sup> ALRC/NSWLRC, above n 1, Recommendation 26-4

<sup>112</sup> See *Criminal Code 1924*, s 331B and *Justices Act 1959* (Tas) s 3(1) definition of ‘affected person’.

<sup>113</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>114</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, *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>>; The ALRC and Human Rights and Equal Opportunity Commission (HREOC), *Seen and Heard: Priorities for Children in the Legal Process*, ALRC No 84 (1997), [14.97]-[14.88], recommendation 103; and the Standing Committee on Law and Justice, *Report on Child Sexual Assault Prosecutions*, NSW Legislative Council Parliamentary Paper No 208 (2002) [4.82] identified the difficulties where a child is required to give evidence on more than one occasion.

undermined if an accused is able to cross-examine complainants as a matter of course on the voir dire in relation to the admissibility of tendency and coincidence evidence. The Assistant Director of Public Prosecutions submitted that he suspected ‘many defence counsel use the procedure because with such complainants they cannot obtain a preliminary proceedings order (see Section 331B(3)(b) of the *Criminal Code*)’. This view was also supported by the Manager of the Director of Public Prosecutions Serious Crime Witness Assistance Unit who submitted that ‘in terms of reducing the trauma for witnesses the first thing that could be done is to minimise the number of times a person has to go through their evidence’. In a similar vein, the former Commissioner for Children (Tasmania) wrote:

The existing Tasmania method of determining the admissibility of tendency and coincidence evidence by voir dire should be discontinued. This would eliminate the necessity for a complainant to be subjected to the trauma of giving evidence in voir dire and being subjected to vigorous cross examination that also provides the defence with a “free shot” at testing the complainant’s capacity to withstand cross-examination.

**3.2.12** 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>115</sup> Repeatedly being required to retell the complainant’s account has implications in the criminal justice context. For example, in *P v The Queen*<sup>116</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>117</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 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. Research has also demonstrated the potential for repeated questioning to contaminate the evidence of children.<sup>118</sup>

**3.2.13** An additional issue that has been raised with the Institute during the consultation process is the significance of the police investigation. 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. Consultations with the Sexual Assault Support Service Tasmania (SASS) also highlighted the importance of the initial contact with the police from the complainant’s perspective. SASS praised some ‘fantastic police officers’, but stated that it was ‘pot luck’ whether a complainant saw an experienced police officer or an inexperienced or insensitive officer. SASS also raised concerns about the level of training police officers received in relation to interviewing children.

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<sup>115</sup> In relation to children, the ALRC and HREOC note that ‘multiple interviews are potentially harmful to the child required to recount traumatic events and to the reliability of that child’s evidence’. See ALRC and HREOC, above n 114, [14.28].

<sup>116</sup> [2002] TASSC 61. This case was decided on the basis of the common law and not the *Evidence Act 2001* (Tas). However, the illustration of the practical difficulties that may arise applies equally to the *Evidence Act 2001* (Tas).

<sup>117</sup> [2006] TASSC 59.

<sup>118</sup> See further at [3.3.23].

**3.2.14** These comments are echoed in the recent report of the ALRC/NSWLRC, that stressed the importance of the initial police response to both future prosecutions and also the experience of the complainant: ‘Stakeholders emphasised that the initial response of the criminal justice system is vital, not only to ensuring that subsequent stages function effectively, but also to minimise the trauma of the process for complainants.’<sup>119</sup>

**3.2.15** In Tasmania, all police recruits receive basic training on sexual assault. More detailed education is provided as part of the detective training program, that includes a unit on sexual assault which encompasses training in interviewing children. In the Institute’s view, police training needs to include specific instruction on evidentiary difficulties (such as allegations of concoction/contamination) that may arise in sexual assault prosecutions and advise as to how the police investigation can minimise these difficulties.

### **3.3 Seeking an appropriate balance**

**3.3.1** It is fundamental that an accused has a right to receive a fair trial.<sup>120</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>121</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>122</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>123</sup> The Victorian Law Reform Commission (VLRC) stated:

The criminal justice system must be, and be seen to be, fair to the accused. People accused of sexual offences are entitled to the presumption of innocence. Conviction for a sexual offence has very serious consequences for an accused, which may include a lengthy prison sentence and life-long stigma. It is vital to ensure that any conviction is based on reliable evidence.

However, the criminal justice system must also take account of the needs of complainants who have a direct interest in the outcome of the prosecution, and of the community interest in encouraging people to report alleged offences and in convicting perpetrators ... [C]urrent deficiencies in the system contribute to substantial underreporting of sexual offences and discourage people who allege they have been assaulted from giving evidence at committal or trial. Criminal procedures that discourage reporting or which stigmatise and traumatised witnesses in sexual assault cases may result in some offenders escaping apprehension, which may put more members of the community at risk.<sup>124</sup>

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<sup>119</sup> ALRC/NSWLRC, above n 1, [26.41].

<sup>120</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*, opened for signature 19 December 1966, 999 UNTS 171, Article 14 (entered into force March 23 1976).

<sup>121</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>122</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, above n 110, 162-163.

<sup>123</sup> NSWLRC, above n 121, [3.66]. See also Spigelman CJ, ‘Truth can cost too much: the principle of a fair trial’ (2004) 78 *Australian Law Journal* 29, 44-45.

<sup>124</sup> VLRC, *Sexual Offences: Final Report* (2004), [1.9]-[1.10]. This was cited in ALRC/NSWLRC, *Family Violence: Improving Legal Frameworks*, CP 1, (2010) [15.73].

The triangulation of interests (accused, complainant and society) that are encompassed in a fair trial have also been recognised in human rights jurisprudence.<sup>125</sup>

3.3.2 Further, as the ALRC/NSWLRC has written, the rights of the accused and the rights of the complainants are ‘not necessarily rights in contest (although they are commonly positioned this way), but rather they both occupy important, related positions in the administration of criminal justice’.<sup>126</sup> This means that the rules of joinder/severance and the cross-admissibility of evidence on the basis of tendency/coincidence evidence should 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.

### ***Dangers of joint trials***

3.3.3 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>127</sup> The rationale for the restriction on the joinder of charges is ‘the fundamental principle that evidence of the commission of offences other than the offence charged is generally inadmissible against the defendant at a criminal trial’.<sup>128</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>129</sup>

Psychological research demonstrates the dangers of admitting character evidence in the criminal process.<sup>130</sup> Aside from the dangers of unfairness to the accused, there is also the difficulty for the jury in dealing with and keeping separate the large amount of evidence in relation to multiple charges.<sup>131</sup>

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

3.3.4 Restrictions on the admissibility of tendency and coincidence evidence reflect the long acknowledged dangers of propensity and similar fact evidence. There is an established view that

<sup>125</sup> See T Henning and J Hunter, ‘An Australian Fair Trial Challenge: Who Are the Losers in Confrontation Law Reform?’ in J Hunter and P Roberts (eds), *Criminal Evidence and Human Rights* (Hart Publishing, forthcoming); J Gans, T Henning, J Hunter and K Warner, *Criminal Process and Human Rights* (Federation Press, 2011) Chapter 11.

<sup>126</sup> ALRC/NSWLRC, above n 1, [24.75].

<sup>127</sup> Western Australian Law Reform Commission (WALRC), *Review of the Criminal and Civil Justice System*, Final Report (1999) [26.3], [26.4].

<sup>128</sup> Ibid, [26.4]. See discussion at [3.3.1].

<sup>129</sup> VLRC, *Sexual Offences – Law and Procedure*, Discussion Paper (2001) [8.51].

<sup>130</sup> See ALRC, above n 31, [3.9]-[3.25].

<sup>131</sup> J Gans, ‘Similar facts after Phillips’ (2006) 30 *Criminal Law Journal* 224, 226.

‘people are likely to overrate the value of similar fact evidence and be influenced improperly by it’.<sup>132</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>133</sup>

3.3.5 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>134</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>135</sup>

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

3.3.6 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>136</sup> Significantly, in the context of sexual offences trials, there is also the reduction of trauma to witnesses and the provision of relevant evidence and a more complete picture of the circumstances to the jury.<sup>137</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>138</sup> The Report recommended that:

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<sup>132</sup> ALRC, above n 30, [8.2].

<sup>133</sup> ALRC, *Uniform Evidence Law*, above n 31, [3.14]. See also VLRC, *Jury Directions*, Consultation Paper (2008) [3.102].

<sup>134</sup> This list is taken from Criminal Justice Sexual Offences Taskforce, above n 16, 74.

<sup>135</sup> See C Williams and S Draganich, ‘Admissibility of propensity evidence in paedophilia cases’ (2006) 11 *Deakin Law Review* 1. This was cited in VLRC, above n 133, [3.102].

<sup>136</sup> WALRC, above n 127, [26.3].

<sup>137</sup> Ibid, [26.3].

<sup>138</sup> ALRC and HREOC, above n 114 [14.87].

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>139</sup>

3.3.7 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>140</sup>

Separate trials mean that the defendant gains ‘a considerable tactical advantage’ by allowing the trial to be conducted in isolation and the defendant can ‘more convincingly argue that each complainant has fabricated her/his evidence due to lack of corroborating evidence from other victims, thus increasing in the likelihood of an acquittal’.<sup>141</sup>

3.3.8 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>142</sup>

The ALRC/NSWLRC’s 2010 Report stated that ‘separate trials create an artificial individualised context in which the charges relating to each complainant are heard separately rather than in context’.<sup>143</sup> It highlighted that separate trials and the exclusion of tendency/coincidence evidence

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<sup>139</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>140</sup> Standing Committee on Law and Justice, above n 114, [4.85].

<sup>141</sup> Cossins, above n 3, 181.

<sup>142</sup> L Chapman, *Review of South Australian Rape and Sexual Assault Laws*, Discussion Paper (2006) [129]-[130].

<sup>143</sup> ALRC/NSWLRC, above n 1, [26.135].

‘about a defendant’s sexual behaviour are considerable barriers to the successful prosecution of sex offences’.<sup>144</sup>

**3.3.9** The relationship between the separation of trials, the impact on the complainant and the attrition of cases during the prosecution phase was noted in the NSW DPP’s submission to the ALRC/NSWLRC:

When the decision is finally made to proceed on separate indictments either by the court or the prosecutor, it can be devastating for complainants. This is probably a significant factor contributing to attrition during the prosecution phase of the case.<sup>145</sup>

**3.3.10** The impact of separate trials and prosecutorial decisions not to proceed on a complaint was explained in the following story provided to the Institute by SASS. S wrote:

It took all my courage to come forward and report my abuse by my brother. I don’t think that I ever would have had it not been for my sister reporting her abuse by him. I felt a sense of relief knowing that we were on this journey together even though I hadn’t seen her in over 15 years.

I believed that we had a good chance of getting a conviction against him if we were given the chance to tell our story together. But when the DPP said that our cases would have to be heard separately in court, I was devastated. I felt very isolated and feared that my sister might drop her allegations against him, and then I would be left on my own. We were told by the DPP that we were not to have contact with each other because we might contaminate evidence for each of our cases. Once again my sister and I became isolated from each other. The rest of my family didn’t believe that my brother had abused me and my sister. He started sexually abusing me when I was 3 years old and didn’t stop until I left home at 18.

I began to have nightmares and was terrified about going outside in case I ran into my brother or other members of my family. This went on for months and I had to have regular counselling to help me cope. As it turned out, the DPP decided to drop the case all together because there wasn’t enough evidence. I went through all that trauma for nothing and he still gets away with it.

**3.3.11** This demonstrates a further problem resulting from the *Hoch* concoction test, 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, there is a reduced likelihood 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. The practical difficulties of securing convictions in cases involving multiple trials was 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 quite similar’.<sup>146</sup> However, the remaining 43 offences were dealt with in separate trials, and ‘the vast majority resulted in not guilty verdicts’.<sup>147</sup> There were also ‘very few guilty pleas in such cases’.<sup>148</sup> This finding needs to be placed in the broader context that sexual offences convictions in themselves are relatively difficult to obtain.<sup>149</sup> In his submission to the ALRC/NSWLRC, the NSW DPP stated that ‘the separation of trials can

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<sup>144</sup> ALRC/NSWLRC, above n 124 [17.98].

<sup>145</sup> ALRC/NSWLRC, above n 1, [26.143].

<sup>146</sup> P Gallagher, J Hickey and D Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, (Research Monograph 15, Judicial Commission of New South Wales, 1997) 20.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> See discussion at [3.3.13]-[3.3.16].

weaken the case to the point that there is no prospect of a conviction'.<sup>150</sup> This is supported by New Zealand research which indicates that similar fact evidence was 'significantly associated with guilty verdicts' as '86.7% of cases with similar fact evidence resulted in a guilty verdict on at least one offence'.<sup>151</sup>

**3.3.12** 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 example is the case of *H*, where (following severance) one of the matters proceeded to trial and the jury returned a not-guilty verdict. The other matter did not proceed. An exception would be the 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>152</sup>

### ***Sexual assault trials in context***

**3.3.13** 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>153</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>154</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 2009-2010 for offenders with adjudicated outcomes, 61% of offenders charged with sexual assault or related offences pleaded guilty in contrast to 86% for other offences (excluding sexual assault and related offences).<sup>155</sup> In cases that proceeded to trial, sexual assault and related offences was often the only offence category where an offender who went to trial was more likely to be acquitted than convicted.<sup>156</sup> In higher courts in 2009-2010, 61% of those who pleaded not guilty to

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<sup>150</sup> ALRC/NSWLRC, above n 1, [26.143].

<sup>151</sup> Cossins, above n 3, [1.6].

<sup>152</sup> *R v F*, Crawford CJ, 21 May 2008.

<sup>153</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>154</sup> See for example, B Bouhours and K Daly, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (vol 39, University of Chicago Press, 2010) 565. Available at <[www.griffith.edu.au/professional-page/professor-kathleen-daly/publications](http://www.griffith.edu.au/professional-page/professor-kathleen-daly/publications)>; 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, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Commonwealth of Australia, 2004).

<sup>155</sup> Australian Bureau of Statistics (ABS), *Criminal Courts Australia 2009-2010*, ABS cat no 4513.0 (2011) 28. This is consistent with previous years, 65% cf 86% (2008-2009), 64% cf 84% (2007-2008); 61% cf 85% (2006-2007); 60% cf. 84.7% (2005-2006); 58% cf 83.9% (2004-2005); 62.4% cf 86.3% (2003-2004); see ABS, *Criminal Courts Australia 2008-09*, ABS cat no 4513.0 (2010) 23; ABS, *Criminal Courts Australia 2007-08*, ABS cat no 4513.0 (2009) 19; ABS, *Criminal Courts Australia 2006-07*, ABS cat no 4513.0 (2008) 14; 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>156</sup> An examination of ABS statistics from 2009-2010 to 2003-2004 showed that the other offence categories to have a greater than 50% chance of an acquittal following a trial were: acts intended to cause injury was for the year 2004-2005; prohibited and regulations weapons and explosive offences and public order offences for the year 2008-2009; property damage and environmental pollution offences and public order offences for the year 2009-2010.

a sexual offence, where a decision was finalised, were acquitted.<sup>157</sup> This is in contrast with 39% of offenders who were acquitted after pleading not guilty to other offences (excluding sexual assault and related offences).<sup>158</sup> Overall, ABS figures show that in 2009-2010, 76% of offenders who were charged with a sexual offence (and the matter proceeded to a conviction or acquittal) were convicted (either by guilty plea or guilty finding) compared with 95% conviction rate for other offences (excluding sexual assault and related offences).<sup>159</sup> If other outcomes (such as cases withdrawn by the prosecution, transferred to other courts or for other reasons not proceeded with) are included in the 2009-2010 ABS data, the conviction rate falls to 59% compared to 82% for all other offences.<sup>160</sup> This shows similar results to the research by Bouhours and Daly, that included ‘other outcomes’ (such as cases that were dismissed or not proceeded with): 52% for South Australia, 49% for New South and 69% for Victoria.<sup>161</sup> In a study of finalised child sexual offences in the Northern Territory between 2001-2006, there were convictions in relation to 28% of offences, either by verdict (4%) or guilty plea (96%), and ‘47% were withdrawn by the DPP’.<sup>162</sup>

**3.3.14** 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>163</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>164</sup>

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<sup>157</sup> ABS, *Criminal Courts Australia 2009-10*, above n 155, 28. This is consistent with previous years, 56% cf 40% (2008-2009); 56% cf 39% (2007-2008) 57% cf 38% (2006-2007); 58.5% cf 39.2% (2005-06); 57% cf. 40.6% (2004-2005); 61.2% cf 37% (2003-2004). See ABS, *Criminal Courts Australia 2008-09*, above n 155, 23; ABS, *Criminal Courts Australia 2007-08*, above n 155, 19; ABS, *Criminal Courts Australia 2006-07*, above n 155, 11; ABS, *Criminal Courts Australia 2005-06*, above n 155, 13; ABS, *Criminal Courts Australia 2004-05*, above n 155, 13; and ABS, *Criminal Courts Australia 2003-04*, above n 155, 29. See also N Taylor, *Judicial Attitudes and Biases in Sexual assault Cases* (Trends and Issues in Crime and Criminal Justice, No 344, 2007).

<sup>158</sup> ABS, *Criminal Courts Australia 2009-10*, above n 155, 28.

<sup>159</sup> Ibid. This is consistent with previous years, 80% cf 94% (2008-2009); 79% cf 92% (2007-2008); 78.1 cf 94.4 (2006-2007); 76.5% cf 93.5% (2005-2006); 76.2% cf. 93.5% (2004-2005); 77% cf. 94.9% (2003-2004). See ABS, *Criminal Courts Australia 2008-09*, above n 155, 23; ABS, *Criminal Courts Australia 2007-08*, above n 155, 19; ABS, *Criminal Courts Australia 2006-07*, ABS cat no 4513.0 (2008), 14; ABS, *Criminal Courts Australia 2005-06*, above n 155, 13; ABS, *Criminal Courts Australia 2004-05*, above n 155, 13; and ABS, *Criminal Courts Australia 2003-04*, above n 155 29.

<sup>160</sup> ABS, 2009-2010, above n 155, 23-24.

<sup>161</sup> See B Bouhours and K Daly, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (Attrition Study Technical Report No. 5, School of Criminology and Criminal Justice, Griffith University, 2008) 17-19.

<sup>162</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are sacred: report of the Northern Territory Board of Inquiry into the protection of Aboriginal children from sexual abuse* (2007), 252.

<sup>163</sup> N Taylor, above n 157, 1, referring to Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 110.

<sup>164</sup> Ibid, 4.

This means that the credibility of the complainant is a major factor relevant to the likelihood of obtaining a conviction.<sup>165</sup>

**3.3.15** 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>166</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 study of juror perceptions in child sexual assault trials.<sup>167</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>168</sup>

**3.3.16** 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 child witnesses. Two studies conducted by the Australian Institute of Criminology show that:

- (1) 'pre-existing juror attitudes about sexual assault not only influence their judgements about credibility of the complainant and guilt of the accused, but also influence judgements more than the facts of the case presented and the manner in which the testimony is given';<sup>169</sup> and
- (2) 'myths and stereotypes about rape and sexual assault are common within the general community'.<sup>170</sup>

Recent Australian research has shown that one quarter of respondents disagreed with the statement that women rarely make up false claims of rape and a further 13% were unsure.<sup>171</sup> When compared to survey findings in 1995, the study found 'an increase in community uncertainty regarding the truthfulness of women's allegations of sexual assault'.<sup>172</sup> In relation to child witnesses, there exists

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<sup>165</sup> Ibid, 1.

<sup>166</sup> D Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609, 634.

<sup>167</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>168</sup> Ibid.

<sup>169</sup> N Taylor, above n 157, 2.

<sup>170</sup> Ibid 2.

<sup>171</sup> VicHealth, *National survey on community attitudes to violence against women 2009: Changing cultures, changing attitudes – preventing violence against women: A summary of findings* (2010) 44; See also N Taylor and J Mouzos, *Community Attitudes to Violence Against Women Survey 2006: Full Technical Report* (2006) referred to by N Taylor, above n 157, 5.

<sup>172</sup> VicHealth, above n 171, 44.

‘centuries of disbelief and suspicion of children who accused adults of sexual crimes’.<sup>173</sup> Knowledge by the jurors of the existence of multiple complainants supports the credibility of each individual complainant and counter-balances the suspicions prevalent within the community about the veracity of sexual assault and child complainants.

### ***The trauma of the trial***

**3.3.17** While 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 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>174</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>175</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>176</sup>

**3.3.18** 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>177</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>178</sup>

The Manager of the Director of Public Prosecutions Serious Crime Witness Assistance Unit indicated that, while there has not been any Tasmanian research, ‘from my experience I believe we have similar difficulties to those quoted in Victoria’.

**3.3.19** Recent research investigating the impact of reforms on the experiences of child complainants has found that the changes ‘introduced to assist ... have been ineffective in improving children’s

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<sup>173</sup> L Kelly, ‘Remembering the point: A feminist perspective on children’s evidence’ in W Westcott, G M Davies and R Bull (eds), *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice* (Wiley, 2002) 361, 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 167; 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>174</sup> VLRC, above n 124, [5.7].

<sup>175</sup> C Eastwood and W Patton, above n 114.

<sup>176</sup> VLRC, above n 124, [4.2].

<sup>177</sup> See, *Evidence (Children and Special Witnesses) Act 2001* (Tas).

<sup>178</sup> VLRC, above n 124, [1.12].

experiences and increasing conviction rates.<sup>179</sup> This supports previous research examining the experiences of child complainants of sexual abuse in the criminal justice system which found that children were dissatisfied with the criminal justice process. 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>180</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>181</sup>

**3.3.20** The Manager of the Director of Public Prosecutions Serious Crime Witness Assistance Unit provided an account of complainants' experiences in the criminal justice system:

Part of the WAS role is to explain to our witnesses the nature of the adversarial trial process. In order to prepare them we must be as honest as possible without being too direct that we might deter them from giving evidence. Although this process is helpful many of our witnesses still find the process daunting. As employees of the DPP we must remain independent and objective in the process. This can be very difficult. In one case for example I visited two complainants in relation to a rape case against the same accused. One was the partner of the accused who indicated that she was very fearful of him. The other girl was a thirteen-year-old neighbour who also alleged rape. There was another charge against another thirteen-year-old neighbour which was eventually proceeded with in the Magistrates Court. The partner decided not to proceed with the case and the matter was discharged. The 14-year-old complainant had to give evidence against the accused in open court in which the public gallery contained a large group of school students. Cross-examination focused on intimate details of anal and vaginal sex despite the fact that the accused denied these occurred in this way. The accused denied rape and claimed that the sex was consensual. The jury found him not guilty. Follow up enquires found that the victim had suffered ongoing harassment from other young people in relation to what she went through and she was hospitalised for self harm shortly after.

This girl, like many complainants felt that she was the one on trial. They, unlike the accused, must give evidence in order for justice to be done. The WAS has seen many examples of stress, tears, anger and anxiety suffered before, during and after giving evidence. Some witnesses have commented even after a guilty verdict that they would not go through the process again. Many people think they are doing the right thing in reporting crime and believe that they are being punished further by the system.

**3.3.21** 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:

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<sup>179</sup> K Richards, *Child complainants and the court process in Australia* (Trends and Issues in Crime and Criminal Justice, No 280 2009) 5.

<sup>180</sup> C Eastwood and W Patton, above n 114, 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* (Trends and Issues in Crime and Criminal Justice, No 250, 2003).

<sup>181</sup> C Eastwood and W Patton, above n 114, 2.

- 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>182</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>183</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>184</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>185</sup>

**3.3.22** 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>186</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>187</sup> Recent reforms also prevent counsel from asking questions during cross-examination that belittle or insult or are otherwise inappropriate or from asking questions that have no basis other than a stereotype.<sup>188</sup> As discussed at [3.2.11], a recognition of the trauma caused to complainants in sexual offence cases by cross-examination is reflected in the restriction that limits the ability of the accused to question a complainant in preliminary proceedings. 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>189</sup> Such reforms are 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.

**3.3.23** In relation to children, aside from the trauma of the cross-examination, empirical research indicates that cross-examination has the potential to distort a child’s testimony rather than elicit the truth.<sup>190</sup> Cossins observes that: ‘Whilst a child’s evidence during cross-examination may be the best evidence *for the defendant*, based on recent studies, ... the best evidence given by a child will be evidence that is *not* subject to standard cross-examination.’<sup>191</sup>

In light of this, researchers warn against the use of multiple interviews of children and leading questions because both increase the chance that a child will “respond affirmatively to leading

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<sup>182</sup> NSWLRC, above n 121, [2.2].

<sup>183</sup> A Cossins, ‘Cross-examination in child sexual assault trials: evidentiary safeguards or an opportunity to confuse?’ (2009) 33 *Melbourne University Law Review* 68; C Eastwood and W Patton, above n 114, 4.

<sup>184</sup> Eastwood and Patton, above n 183, 59. See also ALRC and HREOC, above n 114, [14.110].

<sup>185</sup> Eastwood, above n 114, 5.

<sup>186</sup> *Evidence Act 2001* (Tas), s 194M. For a review of the operation of the forerunner to this provision, 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>187</sup> *Evidence Act 2001* (Tas), s 41.

<sup>188</sup> Ibid, s 41(1)(c) and (d) as amended by No 47 of 2010. See discussion of the effectiveness of similar reforms in New South Wales, R Boyd and A Hopkins, above n 105.

<sup>189</sup> See for example, Office of the Director of Public Prosecutions (ACT) and Australia Federal Police, above n 110, 120; ALRC and HREOC, above n 114, [14.49]; VLRC, above n 124 [3.41].

<sup>190</sup> See Cossins, above n 183, 82-87.

<sup>191</sup> Cossins, above n 3, [4.7].

questions” or change their answers to please an interviewer.<sup>192</sup> Similar concerns about the distortion of a child’s evidence would also apply to repeated cross-examination on the voir dire and then again at trial for the purposes of determining issues of severance and cross-admissibility as tendency/coincidence evidence.

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<sup>192</sup> Ibid [4.53] citing Goodman and Melinder 2007 and Snow and Powell (2007).

## 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 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 and Victoria).<sup>193</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 South Australia, 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 Evidence Act): 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 Evidence Act's 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 Evidence Act): significant probative value & probative value substantially outweigh prejudicial effect. | Relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform Evidence Act's tests.                      |
| ACT | <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 Evidence Act): significant probative value & probative value substantially outweigh prejudicial effect. | Relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform Evidence Act's tests.                      |

<sup>193</sup> Victoria has adopted the uniform *Evidence Act* with the enactment of the *Evidence Act 2008* (Vic).

|     |  |  |   |
|-----|--|--|---|
| NT  | <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.   |
| SA  | <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. A judge is not to have regard to concoction or whether there is a reasonable explanation consistent with innocence. | <i>Criminal Law Consolidation Act 1935</i> (SA), s 278(2a)(c)(i): Relevance other than mere propensity   | Not a precondition to admissibility – <i>Criminal Law Consolidation Act 1935</i> (SA), s 278(2a)(c)(ii)   |
| Vic | <i>Criminal Procedure Act 2009</i> , s194(2): 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>194</sup>  | <i>Evidence Act 2008</i> , ss 97, 98 and 101 (uniform Evidence Act): significant probative value & probative value substantially outweigh prejudicial effect. <sup>195</sup> | Must be eliminated – relevant to admissibility of tendency/propensity evidence as impacts on probative weight and prejudicial impact under uniform Evidence Act's tests. <sup>196</sup> |
| Qld | <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.    |
| WA  | <i>Criminal Procedure Act 2004</i> (WA), s 133(6): 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>194</sup> The *Criminal Procedure Act 2009* (Vic), s 194 replaced the *Crimes Act 1958* (Vic), s 372.

<sup>195</sup> The *Evidence Act 2008* (Vic) replaced the *Crimes Act 1958* (Vic), s 398A which contained an ‘interest of justice’ test.

<sup>196</sup> The *Crimes Act 1958* (Vic), s 398A, which made the possibility of concoction relevant to weight not admissibility of propensity evidence, was repealed by 69/2009, s 42.

|             |   |   |   |
|-------------|---|---|---|
| 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)(d): 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; s 103(1)(a): propensity to commit offences of the kind with which he is charged except where having propensity makes it no more likely than guilty of offence. | 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 outweighs unfairly prejudicial effect. <sup>197</sup>   | Relevant to admissibility – <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   |

<sup>197</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.

## 4.2 Law where relevant to admissibility of evidence

4.2.1 In Tasmania,<sup>198</sup> New South Wales<sup>199</sup> and the Australian Capital Territory (uniform evidence law) and the Northern Territory (common law),<sup>200</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.

4.2.2 In Victoria, the law in relation to tendency/coincidence evidence has been significantly changed with the commencement of ss 97 – 101 of the *Evidence Act 2008* (Vic) on 1 January 2010, and the repeal of the *Crimes Act 1958* (Vic), s 398A. Following the repeal of s 398A, the Victorian position is the same as other uniform *Evidence Act* jurisdictions, so that the issue of contamination/concoction is now relevant to the admissibility of tendency and coincidence evidence under the *Evidence Act 2008* (Vic), ss 97, 98 and 101.<sup>201</sup> This contrasts with the former position under the *Crimes Act 1958*, s 398A, which had altered the common law set out in *Hoch/Pfennig*, so that questions of collusion were not part of a threshold question of admissibility, but rather were matters for the jury to consider in assessing the weight to be attached to evidence.

4.2.3 Unlike other uniform *Evidence Act* jurisdictions, Victoria has a provision that creates a presumption of a joint trial even if evidence is not cross-admissible. This provision was introduced with the former *Crimes Act 1958*, s398A (as discussed above). 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>202</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. The *Crimes Act 1958* (Vic) s 372(3AA)-(3AB) created a presumption of joint trials in cases of sexual abuse even if evidence is not cross-admissible. The section created 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>203</sup> However, the cross-admissibility of evidence remained a powerful consideration in the exercise of the court’s discretion to order a separate trial.<sup>204</sup> As part of the recent changes to the Victorian law, s 372 has been repealed and replaced by the *Criminal Procedure Act 2009* (Vic), s 194(2) (which is in similar terms).

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<sup>198</sup> See discussion at [2.3.17] ff.

<sup>199</sup> See *AE v The Queen* [2008] NSWCCA 52; *BR v R* [2010] NSWCCA 303. This contrasts with Adams J in *R v AB* [2001] NSWCCA 496, [17] (with whom Spigelman CJ and Sully J agreed) that the assessment of probative value for the purposes of the *Evidence Act 1995* had to be made on the assumption that the evidence was true.

<sup>200</sup> See discussion of common law at [2.3.15].

<sup>201</sup> *PNJ v Director of Public Prosecutions* [2010] VSCA 88.

<sup>202</sup> VLRC, above n 129, [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.

<sup>203</sup> See discussion in *R v KRA* [1999] 2 VR 708, 713.

<sup>204</sup> See *Sexual Assault Manual: Investigation, Prosecution and Sentencing in Victoria* (2009) Judicial College of Victoria, [6.6.2.1] <<http://www.justice.vic.gov.au/emanuals/SAM/default.htm>> referring to *R v Papamitrou* (2004) 7 VR 375; *R v Buckley* (2004) 10 VR 215.

4.2.4 In Canada, similar fact evidence is presumptively inadmissible and the onus is on the prosecution to establish that the probative value of the evidence outweighs its prejudicial effect.<sup>205</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>206</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>207</sup> However, if there is evidence that amounts to no more than opportunity, the issue of concoction is left for the jury.<sup>208</sup>

4.2.5 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.<sup>209</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>210</sup>

However, ‘weighing in the mix’ is different from the ‘knock-out’ role that concoction or other influence plays in the Tasmanian context. In *Wyatt*, the Court of Appeal of New Zealand accepted the Crown’s submission that the trial judge had been wrong to give weight to the possibility of collusion as there was only the opportunity for collusion (rather than evidence of collusion) and no evidence of suggestibility, such as where the way in which a question was put may have influenced the response.

4.2.6 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>211</sup> In the submission of Crown Law New Zealand, it was noted that while the *Evidence Act 2006* alters to

<sup>205</sup> *R v Handy* [2002] 2 SCR 908.

<sup>206</sup> Ibid, [99] (Binnie J).

<sup>207</sup> D Watt, *Watt’s Manual of Criminal Evidence*, §34.01.

<sup>208</sup> *R v Handy* [2002] 2 SCR 908, [111] (Binnie J).

<sup>209</sup> This contrasts with the pre-existing common law in New Zealand where, following the United Kingdom approach, 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. See Robertson, *Adams on Criminal Law* (4<sup>th</sup> student ed, 2005) 807 referring to *R v S* 22/9/95, CA201/95.

<sup>210</sup> [2007] NZCA 436, [23].

<sup>211</sup> NZLRC, above n 197, [3.89].

common law by providing that concoction is a relevant factor when determining the admissibility of propensity evidence, ‘there has not been a sea-change whereby complainants are required to testify pre-trial should concoction/collusion be alleged’. This was said to be ‘in large part, ... due to the fact that in cases of a sexual nature there is a presumption against complainants having to give evidence in person prior to trial’.<sup>212</sup>

### 4.3 Law where 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, 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.<sup>213</sup>

**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>214</sup>

**4.3.3** In addition, in some 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 Western Australia, the common law test in *Pfennig/Hoch* is replaced by an ‘interest of justice’ test where the admissibility of propensity evidence is governed by the *Evidence Act 1906*, s 31A(2).<sup>215</sup> In the United Kingdom, which never embraced the *Pfennig/Hoch* test, evidence of propensity must be excluded, under the *Criminal Justice Act 2003*, s 101(3), ‘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>216</sup>

#### *Western Australia*

**4.3.4** Following an earlier review of the criminal justice system by the Western Australian Law Reform Commission (WALRC),<sup>217</sup> key changes were made in relation to the joinder of trials and the

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<sup>212</sup> See *Summary Proceedings Act 1957 (NZ)*, s 185C.

<sup>213</sup> As discussed at [4.2.2]-[4.2.3], in Victoria, although concoction is relevant to the admissibility of evidence, legislation creates a presumption of joint trials in cases of sexual assault, even if evidence is not cross-admissible.

<sup>214</sup> *Criminal Justice Act 2003*, s 109.

<sup>215</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>216</sup> See [4.3.17] ff. See also J Spencer, *Evidence of Bad Character* (Hart Publishing, 2<sup>nd</sup> revised ed, 2009); Roberts and Zuckerman, *Criminal Evidence* (Oxford University Press, 2004); and A Ashworth, ‘Bad Character: Multiple Complainants – Prosecution Contending Each Complainant’s Evidence Being Mutually Supportive’ [2007] *Criminal Law Review* 380, for further discussion of the UK legislation.

<sup>217</sup> WALRC, above n 127, 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

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

4.3.5 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 v The Queen*.<sup>218</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

4.3.6 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>219</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-section (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>220</sup> The court does not have to automatically order separate trials if the evidence is not cross-admissible or because the offences are of a particular nature,<sup>221</sup> and the court can ‘decide that any likelihood of the accused being prejudiced can be guarded against by a direction to the jury’.<sup>222</sup>

#### *Queensland*

4.3.7 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*

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probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion’.

<sup>218</sup> (1995) 182 CLR 461, 529.

<sup>219</sup> This reform took effect from 2 May 2005.

<sup>220</sup> Mr J A McGinty, Tasmania, *Hansard*, Legislative Assembly, 30 June 2004, 4601c-4610a/1 (Attorney-General, Second Reading Speech).

<sup>221</sup> *Criminal Procedure Act 2004* (WA), s 133(5)(b) and (c).

<sup>222</sup> *Ibid*, s 133(5)(a).

*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>223</sup> These provisions were intended to overcome the effect of the decision in *Hoch*.

#### Admissibility of propensity evidence

4.3.8 In Queensland, the effect of the decision in *Hoch* concerning the relevance of concoction to the admissibility of evidence has been abrogated by s 132A of the *Evidence Act 1977* (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.

4.3.9 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 fact evidence on the basis that the evidence is true. This would be consistent with the approach in South Australia and Western Australia. An alternative interpretation is that s 132A only applies where there is a mere or speculative possibility of collusion (as opposed to a reasonable possibility of collusion).<sup>224</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>225</sup> While there has been some doubt as to the correct interpretation of s 132A, in *Phillips v The Queen*,<sup>226</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 was also the approach of the Queensland Court of Appeal.<sup>227</sup> This interpretation is consistent with the views expressed by the Queensland Law Reform Commission (QLRC).<sup>228</sup>

4.3.10 In 2000, the QLRC examined s 132A as part of its consideration of the evidence of children.<sup>229</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>230</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 s 132A.<sup>231</sup> In 2005, the QLRC again considered the rules for the admissibility of propensity evidence and the operation of s 132A as part of

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<sup>223</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).

<sup>224</sup> QLRC, above n 139, 369-370; Criminal Justice Sexual Offences Taskforce, above n 16, 77. This interpretation would be consistent with the recommendation of the Criminal Code Advisory Working Group, *ibid*, 116.

<sup>225</sup> See [2.3.17] ff.

<sup>226</sup> (2006) 225 CLR 303.

<sup>227</sup> *R v PS* [2004] QCA 347; *R v KP; ex parte A-G (Qld)* [2006] QCA 301.

<sup>228</sup> QLRC, *A Review of the Uniform Evidence Acts*, Report 60 (2005) [5.22]-[5.25].

<sup>229</sup> QLRC, above n 139, 333, 368-371.

<sup>230</sup> *Ibid*, 361-368.

<sup>231</sup> *Ibid*, 374-375.

its review of the uniform Evidence Acts.<sup>232</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>233</sup>

#### Joint trials

**4.3.11** 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 or her 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.

This provision reinforces *Evidence Act 1977* (Qld), s 132A<sup>234</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.

**4.3.12** 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>235</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>236</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>237</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>238</sup>

#### ***South Australia***

**4.3.13** 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>239</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.

**4.3.14** 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.

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<sup>232</sup> QLRC, above n 228, Ch 5.

<sup>233</sup> Ibid, 5-7(c) and (d).

<sup>234</sup> See [4.3.18] ff.

<sup>235</sup> QLRC, above n 139, Ch 17.

<sup>236</sup> Ibid, 384.

<sup>237</sup> See [4.2.3] for a discussion of the Victorian provision.

<sup>238</sup> QLRC, above n 139, 400-401.

<sup>239</sup> L Chapman, above n 142, ch 3.

### Admissibility of propensity evidence

**4.3.15** 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 –
    - (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 complainants, 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.<sup>240</sup>

### Joint trials

**4.3.16** 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>241</sup>

### ***United Kingdom***

#### Admissibility of propensity evidence

**4.3.17** The *Criminal Justice Act 2003* (UK) abolished the common law in relation to evidence of bad character (including similar fact evidence)<sup>242</sup> in criminal proceedings and established a statutory

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<sup>240</sup> *R v M* (2011) 110 SASR 1.

<sup>241</sup> South Australia, *Hansard*, House of Assembly, 25 October 2007 (M J Atkinson, Attorney-General) 1468.

scheme.<sup>243</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’.

**4.3.18** 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 s 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>244</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’.

**4.3.19** 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>245</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>246</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.

**4.3.20** Protection for the accused is provided by s 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

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<sup>242</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>243</sup> Section 99.

<sup>244</sup> See discussion in Roberts and Zuckerman, above n 216, 517.

<sup>245</sup> [1995] 2 AC 596.

<sup>246</sup> [1995] 2 AC 596, 612 (Lord Mackay of Clashfern LC).

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>247</sup>

#### Joint trials

**4.3.21** In the UK, the statutory rules that govern the joinder/severance of counts are similar to those operating in Tasmania.<sup>248</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 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>249</sup> If evidence is not cross-admissible, there is no rule that the trial judge must or should invariably order severance.<sup>250</sup>

## 4.4 Law where 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>251</sup> The *Federal Rules of Evidence* provide:

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

- (a) **Permitted uses.** In a criminal case in which the defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.<sup>252</sup>

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

- (a) **Permitted uses.** In a criminal case in which the defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.<sup>253</sup>

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<sup>247</sup> Roberts and Zuckerman, above n 216, 537. See also J Spencer, above n 216, 5.36.

<sup>248</sup> See [2.2].

<sup>249</sup> James Richardson and David A Thomas, *Archbold 2006: Criminal Pleading, Evidence and Practice*, (Sweet and Maxwell, 54th revised ed, 2005) 1-172.

<sup>250</sup> See *Christou* [1997] AC 117.

<sup>251</sup> See *State v Burks* 905 So. 29 294.

<sup>252</sup> This commenced on 1 December 2011 and remodels the wording of the previous section. It is not intended to change the operation of the provision. See M Bender, *USCS Federal Rules of Evidence*, r 413 (available on Lexis, accessed 9 November 2011).

<sup>253</sup> This commenced on 1 December 2011 and remodels the wording of the previous section. It is not intended to change the operation of the provision. Ibid, r 414 (available on Lexis, accessed 9 November 2011).

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>254</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>255</sup>

**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>256</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>257</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>258</sup>

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<sup>254</sup> *Federal Rules of Evidence*, r 401.

<sup>255</sup> A Bocchino, *Commentary Federal Rules of Evidence*, r 413 (available on Lexis, accessed 9 November 2011).

<sup>256</sup> See M Bender, *Federal Rules of Evidence Manual*, [413.02] [414.02] (available on Lexis, accessed 9 November 2011). See also NZLRC, above n 197, [4.69]-[4.7].

<sup>257</sup> Bender, above n 256, [413.02], 414.02.

<sup>258</sup> Bender, above n 252, r 403 (available on Lexis, accessed 9 November 2011).

## Part 5

# Options for Reform and Recommendations

In this part, the Institute makes recommendations in relation to the possible options for reform set out in the Issues Paper where four main options for reform were outlined:

- Option 1 – making no change to the current law;
- Option 2 – making concoction a matter for the jury to determine;
- Option 3 – creating a presumption of a joint trial;
- Option 4 – removing the rules of tendency/coincidence evidence for sexual offences.

It should be noted that these options are not all mutually exclusive. It would be possible to adopt Options 2 and 3 or Options 3 and 4 in conjunction with each other.

### **5.1 Option 1 - no change to the current law**

*5.1.1* Option 1 presented in the Issues Paper was 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>259</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>260</sup> National Legal Aid, in its submission to the ALRC/NSWLRC project on family violence, opposed removing collusion, concoction or suggestion as matters relevant to admissibility. It wrote that if ‘the possibility of concoction, collusion or suggestion cannot be excluded, the probative value of the evidence is properly diminished’.<sup>261</sup>

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<sup>259</sup> Criminal Justice Sexual Offences Taskforce, above n 16, 80.

<sup>260</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant, 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, Evidence of Bad Character in Criminal Proceedings*, Law Commission 273 (2001).

<sup>261</sup> National Legal Aid, *Submission FV 232*, 15 July 2010 cited in ALRC/NSWLRC, above n 1, [27.224].

**5.1.3** An 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>262</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>263</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>264</sup> The anomalous situation of the trial judge determining the reliability of evidence as a precondition to admissibility of tendency and coincidence evidence is heightened by the recent ruling of the Tasmanian Court of Criminal Appeal in *J v State of Tasmania*<sup>265</sup> that the court should not make an assessment of the reliability of the evidence and should accept the evidence as its highest when applying the *Evidence Act 2001* (Tas), s 137 by determining whether the probative value is outweighed by the prejudicial effect.<sup>266</sup>

**5.1.4** The determination of matters of concoction/collusion or contamination by the judge is an unnecessary and undesirable judicial incursion into the proper role of the jury. It is also a judgment that can be made equally as well by the jury. The Director of Public Prosecutions (Tas) observed that:

The concepts are not difficult, and in other contexts juries are routinely entrusted to consider those matters. (Indeed, before video recorded interviews were made compulsory, the regular allegation in criminal trials the jury had to consider was that of concoction by and collusion between police officers).

Similar observations about the suitability of the jury to determine questions of collusion or contamination have been made by Cossins:

Where there is no actual evidence of concoction, a decision that two or more complainants or witnesses have concocted their evidence is a matter of speculation and, thus, highly subjective. This subjectivity raises the question as to whether concoction is a legitimate basis for excluding tendency/propensity evidence, or whether the issue of concoction should be left to the jury when they are assessing the weight to be given to the complainants’ or other witnesses’ evidence.<sup>267</sup>

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<sup>262</sup> [1995] 2 AC 596, 620.

<sup>263</sup> See [1995] 2 AC 596, 622 (Lord Mustill).

<sup>264</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 517. This was referred to in ALRC, above n 31, [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), above n 260, [11.12].

<sup>265</sup> [2011] TASCCA 7.

<sup>266</sup> The court applied the decision in *R v Shamouil* (2006) 66 NSWLR 228. This contrasts with the previous Tasmanian decisions in *Director of Public Prosecutions v Lynch* (2006) 16 Tas R 49 and *Tasmania v Mayne* [2009] TASSC 82. See also T Smith and S Odgers ‘Determining “probative value” for the purposes of section 137 of the uniform evidence law’ (2010) 34 *Criminal Law Journal* 292.

<sup>267</sup> Cossins, above n 3, [3.190].

5.1.5 The current law is said to make sexual assault prosecutions too difficult.<sup>268</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>269</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>270</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>271</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>272</sup> The NSW ODPP’s view, in its submission to the ALRC/NSWLRC project on family violence, was that unless allegations of concoction/collusion are assessed by the jury (rather than rendering the evidence as inadmissible), they:

become a significant barrier to the joinder of charges in respect of multiple complainants because:

- it is very difficult to exclude a reasonable possibility of concoction if the complainants are well known to each other, particularly siblings;
- this issue arises in all institutional sexual assault allegations such as involving teachers, because invariably the victims know each other as they were all at school together;
- there is not a great deal of case law in this area, because many prosecutors do not run counts together if they involve siblings because it is almost impossible to exclude the reasonable possibility of concoction.<sup>273</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. In Tasmania, allowing concoction to be relevant to the admissibility of tendency/coincidence evidence seems to expose the complainant to cross-examination on the voir dire as a matter of course.<sup>274</sup>

5.1.7 Retaining the current position is also contrary to the intended operation of the uniform Evidence Acts. In its consideration of the issue of concoction, the ALRC’s view (in 2005) was that the *Pfennig/Hoch* approach was contrary to the policy of the uniform Evidence Acts. The ALRC stated: ‘[t]he “no rational explanation” test will exclude probative evidence of minimal prejudicial effect.

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<sup>268</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>269</sup> Standing Committee on Law and Justice, above n 114, [4.92].

<sup>270</sup> NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004) 8.

<sup>271</sup> ALRC and HREOC, above n 114, [14.87].

<sup>272</sup> South Australia, Hansard, House of Assembly, Thursday 25 October 2007, 1468 (M Atkinson, Attorney-General).

<sup>273</sup> Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010, cited in ALRC/NSWLRC, above n 1, [27.221].

<sup>274</sup> See discussion at [3.2]. This benefit was recognised by the Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 260, [15.21]-[15.22].

Even though the probative value may clearly outweigh any prejudicial effect, it can be excluded under the no rational explanation test.<sup>275</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, at that time, the ALRC considered that no change was necessary to the provisions of the uniform *Evidence Act* in light of the decision in *Ellis*.<sup>276</sup> The ALRC considered that the courts would further develop the law away from *Hoch* and obviate the need for legislative intervention. This would seem to have been an overly optimistic view as cases subsequent to *Ellis* have held that concoction is relevant to the tests under the *Evidence Acts* ss 97, 98 and 101.<sup>277</sup> In addition, the decision in *Ellis* left open the possibility that the *Pfennig* approach may be appropriate in some cases.<sup>278</sup>

**5.1.8** This issue has again been considered by the ALRC/NSWLRC (in 2010). This report has now recommended changes to the law in relation to the joinder/severance of trials and the law in relation to the tendency/coincidence evidence, given the direction that the case law has developed. The ALRC/NSWLRC has made recommendations in line with Option 2 (concoction is a matter for the jury and not part of admissibility test)<sup>279</sup> and Option 3 (presumption of a joint trial).<sup>280</sup>

### ***Responses received to the Issues Paper***

**5.1.9** There was no support in the responses received for the retention of the current law. The Director of Public Prosecutions (Tas) supported legislative intervention to alter the current position as ‘the position under the *Evidence Act 2001* (Tas) has been reached where there is little practical difference from that which obtained before its enactment, that is the strict *Hoch* position even though every judicial pronouncement acknowledges that was not the legislation’s intention’. The Director supported reform even if this would represent a local departure from the uniform *Evidence Acts*.<sup>281</sup> ‘Local departure seems to be more justified (if there are sound policy reasons) when local rulings have taken the interpretation and application of the Act in a different direction than in other jurisdictions’. He wrote that ‘I contend that the position we seem to have reached where the judge, not the jury, performs the crucial fact finding task in a criminal trial is contrary to the community’s and legislature’s expectations’. The DPP’s comments in relation to divergence from the uniform *Evidence Acts* have been overtaken by ALRC/NSWLRC recommendations for changes to the uniform *Evidence Acts*.<sup>282</sup>

**5.1.10** The submission of the Director of Public Prosecutions (Tas) was supported by Tasmania Police. Changes to the current law were also supported by the former Commissioner for Children Tasmania and the Assistant Director of Public Prosecutions (Tas).

**5.1.11** While expressing no view on the options for reform presented in the Issues Paper, the Director of Public Prosecutions (NSW) indicated that the issues ‘are still problematic in NSW despite

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<sup>275</sup> ALRC, above n 31, [11.68]. This was also recognised by the Law Commission as a disadvantage of the *Pfennig* approach: Law Commission (UK), *ibid*, [11.12].

<sup>276</sup> See ALRC, above n 31, [11.68].

<sup>277</sup> A similar point was made by the QLRC, above n 228, [5.120].

<sup>278</sup> (2003) 58 NSWLR 700, 718. See discussion in Odgers, above n 5, [1.3.7390].

<sup>279</sup> See ALRC/NSWLRC, above n 1, [27.170] – [27.246]. This is discussed further at [5.2].

<sup>280</sup> *Ibid*, [26.136] – [26.153]. This is discussed further at [5.3].

<sup>281</sup> While adopting the uniform *Evidence Acts*, Victoria has retained the presumption of a joint trial for sexual offences, *Criminal Procedure Act 2009*, s194(2). See [4.2.3].

<sup>282</sup> See [5.18].

the *Ellis* decision<sup>283</sup> and advised that there were moves to have the issue revisited by the ALRC and NSWLRC.

### **The Institute's views**

5.1.12 After considering the literature, the submissions received and the recent approach of the ALRC/NSWLRC, the Institute's view is that the current law should be changed so that the possibility of concoction/contamination does not form part of the admissibility test. The Institute found the views of the DPP to be very persuasive. As the DPP pointed out, based on the ruling in *H*, the law has reached a point where:

it is difficult to see how the evidence of complainants in the same family of sexual assaults on them would ever be cross-admissible, as a trial judge can think there is a realistic possibility of contamination even if the complainants deny it happened, and are believed to be honest, and there is no evidence at all that it did. The possibility seems to arise from opportunity.

In his view, the judge, and not the jury, are performing 'the crucial fact finding task in a criminal trial is contrary to the community's and the legislature's expectation'. The Institute agrees. It is contrary to the policy of the uniform *Evidence Acts*, the fact-finding role of the jury and the interests of justice in cases of sexual assault involving multiple complainants.

#### **Recommendation 1**

The law in relation to concoction/contamination and tendency and coincidence evidence contained in the *Evidence Act 2001* (Tas) ss 97, 98 and 101 should be reformed.

## **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, 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>283</sup> It has also been recently recommended by the ALRC/NSWLRC.<sup>284</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>285</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. It also accords with the fact-finding role of the jury.

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:

<sup>283</sup> Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 110, 201.

<sup>284</sup> ALRC/NSWLRC, above n 1, Recommendation 27-13.

<sup>285</sup> See Standing Committee on Law and Justice, above n 114, [4.32]. This is discussed at [5.1.4].

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>286</sup>

The concern is that juries will not follow judicial directions that they must be satisfied that the evidence is free of concoction.<sup>287</sup> However, Cossins points to the ‘number of joint child sexual assault trials in which juries have returned a mixture of guilty and not guilty verdicts’ and says this ‘suggests that properly instructed juries are capable of looking beyond the prejudicial effect of similar fact evidence and carefully considering the evidence pertaining to each count separately’.<sup>288</sup> In *Western Australia v Osborne*, Wheeler JA expressed a similar view that:

it is the common experience of the Court that, in cases of sexual offences where a number of counts are joined in an indictment, juries will return verdicts of guilty in relation to some, and verdicts of not guilty in relation to others. To that extent, experience teaches that a direction warning against impermissible reasoning is likely to be accepted.<sup>289</sup>

**5.2.4** In addition, the concern that jurors will not follow judicial directions needs to be balanced against research that shows that ‘a significant proportion of both jurors and jury-eligible citizens hold a wide range of myths, prejudices and misconceptions about women and children who report sexual abuse’<sup>290</sup> and research that shows that a vast majority of defence counsel use these misconceptions during cross-examination, opening or closing addresses as ‘the platform for the defence’ in child sexual assault cases.<sup>291</sup>

### ***Responses received to the Issues Paper***

**5.2.5** Several of the responses to the Issues Paper supported Option 2. The Director of Public Prosecutions (Tas) supported Option 2, ‘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’. He wrote that:

It is the position in several other, large, jurisdictions, so relevant rulings will be available. It does not lead to joinder of charges which (apart from the possibility of concoction) should not be joined on current principles, which principles are a satisfactory brake on over-enthusiasm to join charges which lack proper or true relativity to each other.

Although I believe the numerous judicial warnings and imprecations judges have obliged themselves to give juries as to how they go about their fact finding task are themselves not fully justified incursions into the jury’s domain, nevertheless it would not be beyond a trial judge’s capacity to fashion a warning or direction to a jury to avoid impermissible reasoning and hence unfair prejudice arising from tendency and coincidence evidence, and indeed that is almost invariably done when such evidence is introduced.

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<sup>286</sup> Criminal Justice Sexual Offences Taskforce, above n 16, 82.

<sup>287</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.

<sup>288</sup> Cossins, above n 3, [3.336].

<sup>289</sup> [2007] WASCA 183, [39]

<sup>290</sup> Cossins, above n 3, [3.165]. These beliefs include: ‘delay in complaint is evidence of fabrication, sexual assault will result in physical evidence and injury, a rape victim would scream and shout, a rape victim would be visibly upset in court, children are easily manipulated into giving false reports of sexual abuse, and a victim of sexual abuse will avoid the offender. See further [3.3.16].

<sup>291</sup> Blackwell (2008) 15 cited in Cossins, above n 3, [3.165].

In its submission, Tasmania Police supported the submission of the DPP.

**5.2.6 The Assistant Director of Public Prosecutions supported Option 2:**

Reliability is normally a question for the jury ... Generally speaking if the evidence of two or more complainants in sexual assault cases, otherwise satisfies the requirements of sections 97 and 98 of the *Evidence Act*, there can be only two possible conclusions either the complainants have concocted the story or the accused is guilty. I would have thought clearly this is an issue for the jury to decide. In no other case does the Judge in effect decide the accused is guilty before the case goes to the jury.

Thus in my view sections 97 to 101 should be amended to exclude the possibility of concoction as a factor in determining admissibility. Although as the report points outs, generally speaking allegations of concoction or contamination are rejected by trial judges, the complainants have to give evidence on multiple occasions and time is spent to conduct *voir dires*. I suspect many defence counsel use the procedure because with such complainants they cannot obtain a preliminary proceedings order (see Section 331B(3)(b) of the *Criminal Code*). Even when complainants do not know each other *voir dires* are held because it is suggested a police officer has contaminated each complainant. Invariably such challenges fail.

The former Commissioner for Children Tasmania also supported law reform that made the possibility of collusion or concoction as matters that went to weight the jury attached to the evidence rather than the admissibility of the evidence.

***The Institute's views***

**5.2.7** As discussed at [5.1.12], the Institute is persuaded that the current law in Tasmania needs to be changed and that the possibility of concoction should be a matter for the jury. It allows the jury as fact-finder to determine the weight to be attached to evidence and provides the jury with a more complete picture of the circumstances of the offence.

**5.2.8** The Institute is aware that changing the rules in relation to the relevance of concoction to the admissibility of tendency and coincidence evidence may not be sufficient to reduce applications to sever trials on the basis of the admissibility of tendency/coincidence evidence. Concoction is only one ground on which defence counsel may base an argument that trials should be severed and defence counsel may rely on other grounds as the basis of application for separate trials. 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, without the requirement for complainants to give evidence. In addition, the recommendations of the Institute in relation to the presumption of a joint trial should reduce the number of applications to sever that are made on the ground that the evidence of one complainant is not cross admissible.

**Recommendation 2**

The *Evidence Act 2001* (Tas) should be amended to provide that, in sexual assault proceedings, tendency or coincidence evidence is not to be ruled inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.<sup>292</sup>

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<sup>292</sup> The wording of this recommendation is based on ALRC/NSWLRC, above n 1, Recommendation 27-13.

### 5.3 Option 3 - Create a presumption of joint trials

5.3.1 Option 3 was 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 was 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>293</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 South Australia and Western Australia, 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 evidence.<sup>294</sup> The intention of Parliament in these three states was that trials for multiple sexual offending should routinely be held together.<sup>295</sup>

5.3.2 In Victoria, the *Criminal Procedure Act 2008* (Vic), s 194 creates a presumption in favour of joint trials for charges of sexual offences<sup>296</sup>:

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.

This section was introduced as part of reforms aimed to overhaul and modernise Victoria’s criminal procedure laws<sup>297</sup> and it substantially re-enacts the *Crimes Act 1958* (Vic), s 372. This means that the interpretation of s 372 is likely to remain relevant to the court’s approach to s 194 and 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>298</sup> As such, the cross-admissibility of evidence ‘will in most cases be a powerful factor influencing the exercise of the discretion’.<sup>299</sup>

5.3.3 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.

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<sup>293</sup> See [2.2].

<sup>294</sup> See [4.3].

<sup>295</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 114, 106; South Australia, *Hansard*, 25 October 2007, 1468.

<sup>296</sup> See further discussion at [4.2.3].

<sup>297</sup> Victoria, *Hansard*, 4 December 2008, 4981 (Mr Rob Hulls, Attorney General, 2<sup>nd</sup> reading speech).

<sup>298</sup> *R v Papamitrou* (2004) 7 VR 375, 376 (Winneke P).

<sup>299</sup> Ibid. See also *R v Buckley* (2004) 10 VR 215.

**5.3.4** In Western Australia, an express presumption in favour of a joint trial has not been created. However, significant changes have been made to the rules of joinder and severance by eliminating the principle set out in *De Jesus*.<sup>300</sup> The *Criminal Procedure Act 2004* (WA), 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.

**5.3.5** 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>301</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>302</sup> This means that a joint trial can be held even if the evidence of the complainants is not cross-admissible.

**5.3.6** There is support in the literature 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>303</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>304</sup>

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<sup>300</sup> See *Western Australia v Osborne* [2007] WASCA 183, [11] (Wheeler JA).

<sup>301</sup> See *WKD v Western Australia* [2005] WASCA 196, [77] (Roberts-Smith JA).

<sup>302</sup> *Ibid*, [108] (Roberts-Smith JA); *Western Australia v Osborne* [2007] WASCA 183, [48]-[49] (Pullin JA).

<sup>303</sup> ALRC and HREOC, above n 114, 334-335.

<sup>304</sup> Police Royal Commission, *Paedophile Inquiry* (vol 4-6, 1997) 1098, cited in Criminal Justice Sexual Offences Taskforce, above n 16, 82.

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* (NSW) s 64.<sup>305</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>306</sup> Since the publication of the Issues Paper, the ALRC/NSWLRC has considered the joinder of trials, as part of its larger review of family violence and has recommended that Commonwealth, state and territory legislation should create a ‘presumption in favour of a joint trial of multiple allegations against the same defendant’ and the legislation should ‘state that this presumption is not rebutted merely because evidence on one charge is admissible on another charge’.<sup>307</sup>

5.3.7 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>308</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.

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>309</sup>

The QLRC also rejected creating a presumption in favour of joint trials in cases of sexual abuse.<sup>310</sup> At the other end of the spectrum, the Law Commission (UK) recommended a presumption in favour of

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<sup>305</sup> Standing Committee on Law and Justice, above n 114, [4.76] ff.

<sup>306</sup> NSW Adult Sexual Assault Interagency Committee, above n 270, 21.

<sup>307</sup> ALRC/NSWLRC, above n 1, Recommendation 26-5.

<sup>308</sup> The CLRD is a small group contained in the Attorney General’s Department of New South Wales.

<sup>309</sup> NSW Adult Sexual Assault Interagency Committee, above n 270, 85.

<sup>310</sup> See QLRC, above n 139, Ch 17.

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>311</sup>

5.3.8 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>312</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>313</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>314</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.

5.3.9 In its recent report, the ALRC/NSWLRC's view was that the main justification for recommending a presumption of a joint trial was 'that joint trials tend to reduce trauma for complainants'.<sup>315</sup> It considered that a presumption of a joint trial 'along the lines of the Victorian provisions [was] desirable to encourage judges to order joint trials in sexual offence proceedings wherever possible'.<sup>316</sup> The Commission noted that an appeal was 'almost inevitable' if a judge ruled in favour of a joint trial<sup>317</sup> and noted the submission of the DPP NSW that 'sexual assault indictments in NSW involving more than one victim are regularly severed; indeed, it could be said anecdotally [that] there is a presumption in favour of separation'.<sup>318</sup> In his submission to this Report, the DPP NSW wrote that 'trials continue to be routinely separated by either the judge or from agreement between defence and prosecution counsel'. The ALRC/NSWLRC cited the ALRC and the Human Rights and Equal Opportunity Commission report that:

When the complainant's credibility is attacked in a separate trial, 'evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused'. This is a situation which may appear to offend common sense and experience and have the potential to cause unfairness and injustice.<sup>319</sup>

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-

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<sup>311</sup> Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 260, [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>312</sup> Standing Committee on Law and Justice, above n 114, [4.76] ff.

<sup>313</sup> This point was made by ALRC and HREOC, above n 114, in relation to children, see discussion at [3.3.15]-[3.3.18].

<sup>314</sup> 23 February 2005, 9 February 2005.

<sup>315</sup> ALRC/NSWLRC, above n 1, [26.152]

<sup>316</sup> Ibid [26.152].

<sup>317</sup> Ibid [26.149] citing Cossins, above n 3, [3.163].

<sup>318</sup> Ibid [26.149].

<sup>319</sup> Ibid [26.150] citing Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 334.

finders may use each count to bolster the other and support an assumption that the defendant must be guilty of at least something.<sup>320</sup>

The ALRC also considered that such a presumption could lead to the jury hearing unacceptably prejudicial evidence that would not otherwise be admissible.<sup>321</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>322</sup> While acknowledging the dangers of the joint trial, the ALRC/NSWLRC stated that ‘this view needs to be balanced against the research on juries that shows that a significant proportion of both jurors and jury-eligible citizens believe in various myths and hold a range of prejudices and misconceptions about women and children who report sexual offences’.<sup>323</sup>

### ***Responses received to the Issues Paper***

**5.3.11** There was limited consideration given to this option in the responses received to the Issues Paper. The former Commissioner for Children Tasmania recommended that the law be reformed so that:

The *Evidence Act* should be amended to create a presumption that trials concerning different child complainants but similar classes of offences and the same accused shall be held jointly if the Crown gives notice of intention to rely on tendency and coincidence (however expressed).

The Director of Public Prosecutions (Tas) considered that Option 2 (concoction being a jury matter) was the ‘soundest’ as it would not lead to ‘an over-enthusiasm to join charges which lack proper or true relatively to each other’.

### ***The Institute’s view***

**5.3.12** After considering the submissions received and the literature (particularly the recent report of the ALRC/NSWLRC), the Institute’s view is that legislation should be enacted that creates a presumption in favour of joint trials in sexual assault cases with multiple complainants. The creation of a special case for sexual assault in *De Jesus* was based on a view that jurors would be unduly prejudiced against the accused in such cases. Contrary to this view, research shows that jurors are sceptical of sexual assault complaints and that jurors are influenced by myths and stereotypes about complainants. The Institute’s view is that it is desirable to provide a complete picture to the jury. Further, it is important to reduce the trauma caused to complainants by having to give evidence on multiple occasions.

**5.3.13** The TLRI agrees with the view expressed by the ALRC/NSWLRC that ‘in some cases … it is clear that the separation of court proceedings will be justified and not “artificial”’. This acknowledges the Director of Public Prosecutions’ (Tas) concern about ‘over-enthusiasm’ in the joinder of charges. However, the Institute’s view is that to encourage trial judges to allow joint trials, a presumption should be created in favour of a joint trial and that such a presumption should not be rebutted only because the evidence is not cross-admissible.

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<sup>320</sup> Law Commission (UK), *Evidence of Bad Character in Criminal Proceedings*, above n 260, [16.8].

<sup>321</sup> QLRC, above n 139, 400-401.

<sup>322</sup> (1986) 61 ALJR 3.

<sup>323</sup> ALRC/NSWLRC, above n 1, [26.134].

**Recommendation 3**

The *Criminal Code* should be amended to:

- (a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and
- (b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible in relation to another charge.<sup>324</sup>

## **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** This option 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 dispositions 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 dispositions to exclude evidence.<sup>325</sup>

**5.4.2** Under the *Evidence Act 2001* (Tas), 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. Dispositions 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.

<sup>324</sup> The wording of this recommendation is based on ALRC/NSWLR, above n 1, Recommendation 26-5.

<sup>325</sup> See [4.4].

Section 137 is a mandatory provision (rather than a true discretion) that applies only in criminal proceedings: ‘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>326</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>327</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>328</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 by 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 admitting 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>329</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

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<sup>326</sup> S Odgers, above n 5 [1.3.6880].

<sup>327</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 139, 363.

<sup>328</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>329</sup> Standing Committee on Law and Justice, above n 114, [4.65].

offences against multiple victims. This report concluded that there was merit in considering changes as suggested by the New South Wales Committee.<sup>330</sup>

**5.4.6** In 2004, the NSW Adult Sexual Assault Interagency Committee released a report examining proposals for sexual assault law reform.<sup>331</sup> This report was not confined to child sexual assault. It included a review of the rules of tendency/coinidence 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>332</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>333</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>334</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;

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<sup>330</sup> Office of the Director of Public Prosecutions (ACT) and Australia Federal Police, above n 110, 201.

<sup>331</sup> NSW Adult Sexual Assault Interagency Committee, above n 270.

<sup>332</sup> *Ibid.* 8.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.* 9-10.

- (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.

**5.4.8** Several advantages of this option 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>335</sup> (2) the difficulty of proving sexual offences;<sup>336</sup> (3) the problem posed by serial rapists;<sup>337</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>338</sup>

In addition, it has been argued that evidence of previous sexual offending is highly probative.<sup>339</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>340</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; either that the allegations are the result of concoction/collusion or that the person has a propensity to rape.<sup>341</sup>

**5.4.9** 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>342</sup> (2) sexual offenders should be treated differently because of the particular danger they pose to society;<sup>343</sup> and (3) sexual offences should be treated differently because of the particular problems they pose in gathering evidence.<sup>344</sup>

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<sup>335</sup> J Temkin, *Rape and the Legal Process* (Oxford University Press, 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>336</sup> Temkin, above n 335, 238; Orenstein, above n 335, 4.

<sup>337</sup> Temkin, above n 335, 240. See also Orenstein, above n 335, 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>338</sup> Temkin, above n 335, 239.

<sup>339</sup> Ibid, 240. See also A Orenstein, above n 335, 4-5.

<sup>340</sup> Temkin, above n 335, 239.

<sup>341</sup> Gans, above n 131, 229. See further at 6.2.2. Note also the observation of Wheeler JA in *Western Australia v Osborne* [2007] WASCA 183, [29].

<sup>342</sup> These arguments were outlined and rejected by the Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct by a Defendant*, above n 260, [9.25]-[9.27]. See also J Temkin, above n 335, 235-238.

<sup>343</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct by a Defendant*, above n 260, [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>344</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct by a Defendant*, above n 260, [9.31]-[9.34] referring to Karp, ‘Evidence of Propensity and Probability in Sex Offence Cases’ (1994) 70 *Chicago Kent Law Review* 15.

5.4.10 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>345</sup>

5.4.11 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 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>346</sup>

5.4.12 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>347</sup> In its Final Report, the Commission gave further consideration to the need for different admissibility rules for sexual offence 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>348</sup> Ultimately, the Commission did not recommend any special propensity rules for sexual offences.<sup>349</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>350</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>351</sup>

5.4.13 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:

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<sup>345</sup> Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct by a Defendant*, above n 260, [6.61].

<sup>346</sup> NZLRC, *Disclosure to Court of Defendants’ Previous Convictions*, Issues Paper 4 (2007) [6.67].

<sup>347</sup> Ibid.

<sup>348</sup> NZLRC, above n 197, [6.70]-[6.72].

<sup>349</sup> Ibid, [6.73].

<sup>350</sup> Ibid, [10.7].

<sup>351</sup> Ibid, recommendation 11.3

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 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>352</sup>

Further, the US Federal Rules of Evidence rules 413 and 414 have been subjected to considerable criticism within the USA.<sup>353</sup> The rules reflect a politically motivated agenda rather than a sound policy rationale. Cossins notes that the ‘legislative history of these provisions “is well documented as a quid pro quo to obtain the final vote needed for a passage of then President Clinton’s expansive crime bill”’.<sup>354</sup>

**5.4.14** 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>355</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>356</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>357</sup> The concern is twofold (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

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<sup>352</sup> (1995) 182 CLR 461, 512-513.

<sup>353</sup> See E Imwinkelried, ‘Reshaping the “grotesque” doctrine of evidence: The reform implications of the most recent psychological research’ (2008) 36 *South Western University Law Review* 74; M Raeder, ‘Litigating sex crimes in the United States: has the last decade made any difference’ (2009) 6 *International Commentary on Evidence* 1.

<sup>354</sup> Cossins, above n 3, [3.408] citing Raeder (2009) 25.

<sup>355</sup> NZLRC, above n 346, [7.35].

<sup>356</sup> NZLRC, above n 197, [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>357</sup> NZLRC, above n 197, [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.’

inference of disposition which is available from the previous convictions, and convict on propensity grounds'.<sup>358</sup>

**5.4.15** In its recent report, the ALRC/NSWLRC gave consideration to whether special rules of evidence should be created that applied only to sexual assault proceedings. It rejected such a reform on the basis that a case had not been made out and that '[s]uch rules would risk introducing complexity and uncertainty in uniform Evidence Acts jurisdictions'.<sup>359</sup>

### ***Responses received to the Issues Paper***

**5.4.16** There was limited support for this option in the responses received to the Issues Paper. While some responses did not address the option, the Director of Public Prosecutions (Tas) explicitly did not support it on the grounds that it had potential for arbitrariness, as 'in practice such "general dispositions" are unpredictable in application and largely immune to appellate harmonisation'. Tasmania Police supported the submission of the Director of Public Prosecutions (Tas). Similarly, the Assistant Director of Public Prosecutions (Tas) expressed the view that:

I do not think special provisions are required to remove restrictions for tendency/coincidence evidence in cases of sexual assault. I think generally speaking the rules should apply to all crimes and there is no rationale to having any exception for sexual assault. Such cases are serious crimes and there is no rationale to have any exception for sexual assault. Such cases are serious crimes and the same rules of admissibility should apply. Otherwise if evidence is admitted, which does not meet the general strict standards of Section 97-101, we create a special category of offences where character is admissible to prove guilt, but not admissible in otherwise equally serious offences such as ill-treat a child.

**5.4.17** The former Commissioner for Children Tasmania appeared to support some alteration to the current law to expand the type of evidence that a jury is able to hear in sexual assault cases involving multiple complainants. He observed that ss 137, 55 and 56 'represent the fundamental principles of evidence that underpin the presumption of innocence' and he subsequently wrote that:

IT IS SUBMITTED that in the case of child complainants it is fair, it is in the interests of justice and it is in the public interest that the processes of the criminal law should do everything to encourage the reporting of child assaults that does not unfairly prejudice the accused's prospects of acquittal.

The former Commissioner also wrote that:

IT IS SUBMITTED that the jury should not be deprived of evidence that would otherwise provide a more accurate picture of the circumstances surrounding alleged assaults. Accordingly the jury should not be deprived of the opportunity (through one or more complainants) to provide corroborative evidence of other evidence in support of other counts and of each other, particularly when credit is in issue, which is almost always the case. Sections 56 and 137 of the *Evidence Act* will exclude evidence that is not logically probative or which is unduly prejudicial, and juries should be trusted not to be improperly swayed by probative and appropriately presented facts.

While these comments would appear to support the creation of a special category of offence to which the rules of tendency and coincidence evidence do not apply, ultimately the former Commissioner's recommendation for reform supported Options 2 and 3.

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<sup>358</sup> NZLRC, above n 346, [7.38]. See also NZLRC, above n 197, [7.40].

<sup>359</sup> ALRC/NSWLRC, above n 1, [27.235].

***The Institute’s view***

5.4.18 After considering the literature and the submissions received, the Institute’s view is that it is undesirable to introduce a reform that would create a special category of offences that were outside the special admissibility restrictions that apply for tendency/coincidence evidence. While the Institute acknowledges the difficulties of proof in sexual offending cases, the Institute’s view is that to remove the protections afforded the accused by the rules of tendency and coincidence evidence would alter the balance too far. Law reform should not be ad hoc and the Institute is not satisfied that a clear rationale exists to alter the law as suggested in Option 4. Further, Option 4 is inconsistent with the proposed reforms contained in the recent ALRC/NSWLRC report.

**Recommendation 4**

The rules of tendency and coincidence evidence contained in the *Evidence Act 2001* (Tas), ss 97, 98 and 101 should not be removed for sexual offences.

## Part 6

# The Impact of Phillips' Case

*6.1.1* As stated in Part 1, during the research for this project, the Institute identified the High Court decision in *Phillips v The Queen*,<sup>360</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. In the Issues Paper, the Institute sought feedback on whether it was thought that the decision would impact on the cross-admissibility of evidence in Tasmania and, if so, whether legislation was necessary to abrogate the decision as it applies in Tasmania. The case involved the alleged serial ‘date’ rape of six teenage girls. A key issue at trial was consent – the complainants 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>361</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>362</sup> The implications of the decision were also considered by the ALRC/NSWLRC review of family violence, where the Commission asked ‘what impact *Phillips v The Queen* has had on the prosecution of sexual assaults where there are multiple complainants against the same defendant and whether there is a need to introduce reforms to overturn the decision’.<sup>363</sup>

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<sup>360</sup> (2006) 225 CLR 303.

<sup>361</sup> (2006) 225 CLR 303, 316 (the Court quoting the trial judge).

<sup>362</sup> J Gans, above n 131; D Hamer, above n 166; 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); Cossins, above n 3, [3.354]-[3.411].

<sup>363</sup> ALRC/NSWLRC, above n 1, [27.252].

## 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:

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>364</sup>

The High Court considered that consent ‘is the behaviour of the complainants, not the defendants, and that the behaviour described by each complainant was “entirely unremarkable”, [and] held that the fact that there were multiple allegations was irrelevant’.<sup>365</sup>

### ***Consideration 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>366</sup>

6.2.3 In a similar vein, Wheeler JA observed in *Western Australia v Osborne*,<sup>367</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”

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<sup>364</sup> (2006) 225 CLR 303, 318.

<sup>365</sup> J Gans and A Palmer, *Uniform Evidence* (Oxford University Press, 2010), 239 citing *Phillips v R* (2006) 225 CLR 303, [50], [56].

<sup>366</sup> J Gans, above n 131, 229.

<sup>367</sup> [2007] WASCA 183.

was such that all, or most, of the complainants, must have been truthful'.<sup>368</sup> Wheeler JA then stated that:

It seems to me that it was reasoning of broadly this kind that the trial Judge may have been attempting to leave to the jury, but which his Honour mistakenly identified as the issue of consent, rather than an issue of the appellant's knowledge and understanding of a lack of consent, or, put another way, the appellant's willingness to persist with sexual penetration over protest, or in the clear absence of consent.<sup>369</sup>

6.2.4 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 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>370</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>371</sup>

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

6.2.5 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>372</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>373</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* (Tas),<sup>374</sup> the wording of the High Court judgment suggests that evidence of multiple complainants may be ruled inadmissible under the *Evidence Act 2001* (Tas).<sup>375</sup> In Tasmania, in obiter comments, the High Court's statement

<sup>368</sup> Ibid, [29].

<sup>369</sup> Ibid, [29].

<sup>370</sup> D Hamer, above n 166, 616.

<sup>371</sup> Ibid, 638.

<sup>372</sup> *Evidence Act 2001* (Tas), s 56(2).

<sup>373</sup> Ibid, s 55(1).

<sup>374</sup> The *Evidence Act 2001* (Tas) 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>375</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* (Tas) and to the discretion to exclude evidence under s 137 *Evidence Act 2001* (Tas).

has already been cited as authority for the proposition that multiple complaints are not relevant to the issue of consent.<sup>376</sup>

6.2.6 In the application of the decision in *Phillips* to the *Evidence Act 2001* (Tas), 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 might be avoided by approaching the evidence of multiple complainants as tendency evidence that reveals the accused’s tendency to procure participation in sexual activity by force, threats or intimidation. 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.

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>377</sup>

6.2.7 This approach caused the High Court to focus on the evidence in terms of 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>378</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* (Tas) s 97 (that is, evidence that the accused had a tendency to behave in a certain way). In Tasmania, rape is a crime constituted by: (1) sexual intercourse; (2) absence of consent; and (3) where appropriate, absence of an honest and reasonable mistaken belief in consent.<sup>379</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* (Tas), s 97)<sup>380</sup> to have sex in such circumstances.

6.2.8 Cossins has suggested that the approach of the Institute is akin to asserting that the accused had a propensity to rape and that it relies on impermissible circular reasoning, and accordingly

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<sup>376</sup> *Bellemore v Tasmania* [2006] TASSC 111, [110] per Slicer J. It has also been applied in other uniform *Evidence Act* jurisdictions: *Wilson v The Queen* [2011] VSCA 328; *R v Pazmino* [2011] ACTSC 148. In *R v Yasi* [2009] NSWDC 77, Bennett DCJ stated that ‘although *Phillips v The Queen*, as the Crown correctly points out, must be read with appropriate circumspection when considering the terms of the legislation ..., it does provide guidance’ at [78].

<sup>377</sup> *Phillips v The Queen* (2006) 225 CLR 303, 316.

<sup>378</sup> [2007] TASSC 112.

<sup>379</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* (Lawbook Co, 2<sup>nd</sup> ed, 2005) 558 for a summary.

<sup>380</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].

tendency reasoning does not represent a possible reply to the High Court's objections to the evidence of the six complainants'.<sup>381</sup> Cossins says that:

[I]t is ... circular to argue that Phillips' alleged sexual assault of BS [one of the complainants] shows that he has a propensity to rape since lack of consent by BS is the issue that the prosecution has to prove beyond reasonable doubt. Until the jury found him guilty, Phillips was not a rapist and the evidence of BS could not be used to show he had a propensity to rape.

The Institute's view is that the circularity argument rests on the premise that a fact in issue in a rape trial is the accused's tendency to rape. This is not a fact in issue. Rather, the facts in issue are whether the accused had sexual intercourse without consent or mistakenly believing in the existence of consent. Evidence from a number of independent sources that the accused had sex on several occasions without consent tends to mutually support each individual account by a process of tendency reasoning. It is on this basis that the evidence is relevant. Once it is recognised that a tendency to rape is not a fact in issue, the circularity argument becomes irrelevant.

#### 6.2.9 Cossins has suggested an alternative basis for the relevance of the evidence:

The test of relevance both at common law and under the UEA is the same... For example, does evidence that the defendant has been the subject of five other allegations of sexual assault involving aggression, force and/or violence over two and a half years rationally affect the assessment of the probability that the first complaint occurred in circumstances of aggression and force? The answer must surely be yes since relevance is a relatively low threshold test (*Papakosmas* (1999) 196 CLR 297). This fact is, in turn, relevant to the probability of the existence of lack of consent.

In other words, the evidence shows a pattern of behaviour by Phillips which is inconsistent with consent having been given by each complainant because it shows the objective improbability that so many women would have described sexual behaviour involving aggressions and force and yet have given their consents. It is clear from the case law that when assessing whether a woman or girl has consented, her behaviour during the sexual interaction (such as crying, screaming or resisting) as well as the accused's behaviour (such as, the use of force or weapons) is relevant to consent because it is reasoned that consent is less likely to occur when there is evidence of either force, resistance or both.

The similar fact evidence in *Phillips* is relevant because it corroborates each complainant's story that sex occurred in circumstances of violence, force or threats of force – thus the evidence is admissible, not for the purposes of showing the state of mind of each complainant as the High Court argued, but as corroborative evidence to prove the context of violence which is a fact *relevant* to each of the three facts in issue [consent, mistaken belief as to consent and the actus reus].<sup>382</sup>

Whether the evidence is relevant as tendency or coincidence evidence, the Institute would agree that the multiple complainants' accounts are clearly relevant.

#### 6.2.10 In view of the potential difficulties posed by *Phillips* case in uniform *Evidence Act* jurisdictions, Cossins suggested a model for legislative reform that made it clear that, in the appropriate case, evidence of one complainant is relevant to the issue of lack of consent as corroborative evidence.<sup>383</sup>

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<sup>381</sup> Cossins, above n 3, [3.358].

<sup>382</sup> Ibid, [3.361]-[3.363].

<sup>383</sup> This is based on the analysis of the Canadian Supreme Court in *R v Handy* [2002] 2 SCR 908.

- (1) This section applies to proceedings in respect of a prescribed sexual offence and despite any rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment.
- (2) In a joint trial involving two or more counts, the evidence of one complainant (the ‘first complainant’) about the alleged sexual acts and behaviour of the defendant, and/or the circumstances giving rise to the sexual acts, is admissible as corroborative evidence in relation to the issue of lack of consent by another complainant (the ‘second complainant’), if there is a sufficient relationship, in terms of the circumstances and events giving rise to the offences, between the evidence of the first and second complainants. These circumstances can include but are not limited to:
  - (i) the proximity in time of the sexual acts;
  - (ii) the number of occurrences of the sexual acts;
  - (iii) the behaviour accompanying the sexual acts, including evidence of the use of intoxicating substances, pornography, force, violence or threats of force or violence; and
  - (iv) the social context surrounding or relating to the sexual acts.
- (3) In considering whether a sufficient relationship exists for the purposes of sub-section (2), it is not open to the court to decide that a sufficient relationship does not exist merely because of an absence of striking similarities in the evidence of the first and second complainants about the sexual acts of the defendant.<sup>384</sup>

In its consideration of *Phillips*, the ALRC/NSWLRC discussed the issue of relevance and, relying on Cossins’ analysis, ‘recognised that there are valid concerns about the effects of this aspect of the decision in *Phillips* on the conduct of sexual assault proceedings’.<sup>385</sup> However, the Commissions did not recommend any changes to the law due to the uncertainty of the practical implications of *Phillips* and the complexity of reform and the associated risk of introducing new uncertainties.<sup>386</sup>

## 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>387</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

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<sup>384</sup> Recommendation 3.11. Subsection (3) relates to the requirement for striking similarity at common law. In relation to *Phillips*, this is discussed at [6.3].

<sup>385</sup> ALRC/NSWLRC, above n 1, [27.260].

<sup>386</sup> Ibid, [27.260], [27.262].

<sup>387</sup> *Hoch* (1998) 165 CLR 292, 294-295 (Mason CJ, Wilson and Gaudron JJ).

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>388</sup> Before the High Court, the Director of Public Prosecutions' argument was that 'the conduct alleged on each incident [was] consistent with an overall pattern of conduct by Phillips'.<sup>389</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>390</sup>

It was submitted that these features were a 'common "pattern" or "thread"' or a "'combined pattern and flavour'".<sup>391</sup> The Director of Public Prosecutions submitted that the accounts, when arranged chronologically, showed an escalation in the planning, confidence and violence in the rapes alleged by the complainants.<sup>392</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>393</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>394</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>395</sup>

### ***Consideration 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:

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<sup>388</sup> (2006) 225 CLR 303, 312.

<sup>389</sup> Gans, above n 131, 233.

<sup>390</sup> (2006) 225 CLR 303, 320.

<sup>391</sup> Ibid.

<sup>392</sup> Gans, above n 131, 234.

<sup>393</sup> (2006) 225 CLR 303, 321.

<sup>394</sup> Ibid.

<sup>395</sup> Ibid, 322.

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, the characterisation of Phillips’s alleged conduct as ‘entirely unremarkable’ is, with respect, remarkably inapposite.<sup>396</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>397</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>398</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>399</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>400</sup>

**6.3.5** Cossins has also critiqued the High Court’s analysis of the similarity in the complainants’ version of events. She writes that the view that the similarities ‘were entirely unremarkable’:

raises the question why the Court, comprised on five male judges, considered it was entirely unremarkable for a male teenagers to seek sex with teenage girls using force, violence or threats of violence when Phillips’ behaviour shows all the hallmarks of a serial sex offender.

What is remarkable about the evidence is that it demonstrates a pattern of predatory behaviour whereby each complainant was targeted by the defendant, manipulated into being alone with him, including the invention of a party where necessary, approached sexually and subject to either force, violence or threats if she did not comply with his wishes. This predatory behaviour is entirely remarkable, in that it represents the behaviour of a serial sexual offender who targets particular victims, rather than the expected behaviour of a teenage boy negotiating sex with peers, and shows a pattern of behaviour that was premeditated and planned.<sup>401</sup>

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<sup>396</sup> Gans, above n 131, 234.

<sup>397</sup> Hamer, above n 166, 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>398</sup> Hamer, above n 166, 625.

<sup>399</sup> Hamer (2007), above n 362.

<sup>400</sup> Hamer, above n 166, 626.

<sup>401</sup> Cossins, above n 3, [3.369]-[3.370].

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

6.3.6 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* (Tas). 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>402</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>403</sup> There is no requirement under the *Evidence Act 2001* (Tas) 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>404</sup>

This careful assessment appears to be already occurring in many of the Tasmanian cases identified.<sup>405</sup>

6.3.7 In any event, in relation to tendency evidence, while the degree of similarity between the incidents has been a factor identified as being relevant to the assessment of the probative value for the purposes of *Evidence Act 2001* (Tas), s 97,<sup>406</sup> it is only a factor to be taken into account. In relation to coincidence evidence, changes to s 98 have lowered the threshold of similarity required for admissibility. Section 98 no longer 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’. Section 98 now requires that the court should have regard to any similarity in the events or the circumstance or in both the events and the circumstances when determining whether the evidence has significant probative value. While the court has regard to any similarities that exist, the test is different from the common law test of ‘striking similarity’.

6.3.8 Nevertheless, the standard for admissibility was set very high in *Phillips* and case law has recognised the relevance of the common law requirements to “guide” the reasoning process when determining whether tendency or coincidence evidence has significant probative value under ss 97 and 98 of the uniform *Evidence Acts*.<sup>407</sup> 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>408</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>409</sup> will influence the interpretation of the provisions of the *Evidence Act 2001* (Tas). This has occurred in other jurisdictions that have adopted the uniform *Evidence Act*. In the Australian Capital Territory case of *R v Forbes*,<sup>410</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

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<sup>402</sup> See [2.3.15] for discussion of common law ‘no rational inference’ test.

<sup>403</sup> See discussion in *Phillips* (2006) 225 CLR 303, 320-321.

<sup>404</sup> Odgers, above n 5, [1.3.6680].

<sup>405</sup> See [2.3.4] and [2.3.9]-[2.3.12].

<sup>406</sup> See [2.3.4]-[2.3.5].

<sup>407</sup> Cossins, above n 3, [27.187] referring to *R v Fletcher* (2005) 156 A Crim R 308, [60]; *AE v The Queen* [2008] NSWCCA; *R v Milton* [2004] NSWCCS; *R v Harker* [2004] NSWCCA; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

<sup>408</sup> Hamer (2007), above n 362.

<sup>409</sup> Gans, above n 131, 244.

<sup>410</sup> [2006] ACTSC 37.

had not subjected the evidence to as rigorous a scrutiny as I should have.<sup>411</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.

**6.3.9** Aside from any specific critique of *Phillips*, there has been more general academic criticism of the ‘striking similarity’ test. Cossins has argued that the test is problematic for three reasons:

- (i) Because the test does not accord with information about child sex offender behaviour described in the psychological literature, it amounts to a false measure for assessing the probative value of evidence about a defendant’s sexual behaviour.
- (ii) Corroborative evidence of child sexual abuse is uncommon which is likely to be one of the reasons why low conviction rates are found in child sexual assault trials. Thus the striking similarities test is likely to contribute to low conviction rates where its effect is to exclude relevant corroborative evidence which is judged to be insufficiently similar with the evidence of the complainant.
- (iii) If there is a lack of striking similarities between the evidence of two or more complainants, a joint trial is less likely to be held. This, in turn, will result in more separate trials with a decreased likelihood of serial sex offenders being convicted.<sup>412</sup>

Cossins argues that the ‘striking similarities’ test was developed in cases where the identity of the offender was at issue, and that the ‘[s]imilarity of conduct does not play the same role in cases where there is no dispute about the identity of the offender’.<sup>413</sup> This was recognised in the *Director of Public Prosecutions v P*, where Lord Mackay stated:

[w]here the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called ... a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.<sup>414</sup>

In view of the literature on sexual offending and the application of the ‘striking similarities’ in case law, Cossins asserts that it is an artificial test that fails to take account (in cases of child sexual assault) the reality that ‘each offender’s sexual behaviour will depend on the degree of access to the child, the age of the child, the sex of the child, and the child’s reactions to sexual touching’.<sup>415</sup>

**6.3.10** In addition to the issue of relevance (as detailed at [6.2]), Cossins considered that legislative reform was necessary to overcome the effects of *Phillips* in relation to the striking similarities test and she recommended amending ss 97, 98 and 101 to make it clear that the court must not have regard to whether the evidence has ‘striking similarity’:

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<sup>411</sup> *Ibid*, [3] (Gray J).

<sup>412</sup> Cossins submission to the ALRC/NSWLRC, above n 1, cited at [27.217].

<sup>413</sup> Cossins, above n 3, [3.399].

<sup>414</sup> [1991] 2 AC 447, 462.

<sup>415</sup> Cossins, above n 3, [3.400].

Recommendation 3.12

Insert the following sub-sections into s 97 of the Uniform Evidence Act:

(3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence about the sexual conduct of the defendant has significant probative value for the purposes of subsection (1), the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual conduct of the defendant.

(5) It will be sufficient for evidence about the sexual conduct of the defendant to have significant probative value if that evidence shows the defendant has committed a charged or uncharged act of a sexual nature of any kind against or in the presence of a child.

Insert the following sub-sections into s 98 of the Uniform Evidence Act:

(3) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(4) In considering whether evidence of two or more events which describe the sexual conduct of the defendant has significant probative value for the purposes of subsection (1), the court must not exclude the evidence solely on the basis that there are insufficient similarities (or no 'striking similarities') in the sexual conduct of the defendant.

(5) It will be sufficient for the evidence of two or more events to have significant probative value if the evidence shows that the defendant has committed charged or uncharged acts of a sexual nature against a child, irrespective of whether the acts involve the same or different sexual conduct on the part of the defendant.

Note: For example, if event 1 describes the commission of oral sex by the defendant on a witness and event 2 describes the commission of sexual penetration by the defendant on another witness, these events will have the required degree of similarity to satisfy the significant probative value test in sub-section (1).

Insert the following sub-sections into s101 of the Uniform Evidence Act:

(5) The following sub-sections apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(6) In considering, for the purposes of subsection (2), whether the probative value of evidence about the sexual conduct of the defendant substantially outweighs its prejudicial effect, the court must not have regard to whether or not the evidence has striking similarities with other evidence about the sexual conduct of the defendant.

*6.3.11* This was said to accord with the position in Western Australia,<sup>416</sup> where the courts (in applying the threshold test of 'significant probative value' in the *Evidence Act 1906*, s 31A) have accepted that the 'striking similarity' test does not have to be met provided there is 'an underlying unity or pattern of how the sexual assaults took place, irrespective of what physical acts they

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<sup>416</sup> Cossins, above n 3, [3.411].

individually involved’.<sup>417</sup> It did not matter that there were differences in the circumstances of each offence or that the acts of sexual intercourse were not the same.<sup>418</sup>

**6.3.12** The requirement for striking similarity at common law and its application to the uniform *Evidence Act* was considered by the ALRC/NSWLRC. It canvassed the arguments of Cossins and the counter views of other stakeholders.<sup>419</sup> The Public Defenders Office NSW submitted that ‘NSW courts are not bound to a “striking similarities” test’ and that the distinctions between NSW and Western Australia were not as significant as suggested.<sup>420</sup> The ALRC/NSWLRC concluded that ‘there is insufficient reasons to recommend reform in uniform *Evidence Acts* jurisdictions to address perceived over-reliance on “striking similarities” as a test for the admissibility of tendency or coincidence evidence’.<sup>421</sup>

### ***Responses received to the Issues Paper***

**6.3.13** The impact of the *Phillips* case was directly addressed in two submissions. The Director of Public Prosecutions (Tas) did not consider that the case would have a significant impact. He wrote:

There is only one reported case I have found in which a court in a jurisdiction with a uniform *Evidence Act* was asked to consider the impact of *Phillips* upon a severance application, and that case which followed quickly after *Phillips* was delivered was *R v Benjamin James Forbes* [2006] ATCSC 47, a decision of Gray J of the Supreme Court of the ACT. His Honour commented that *Phillips* caused him to realise he had not subjected the evidence to ‘*as rigorous a scrutiny as I should have*’ in making an earlier ruling. It did not appear that His Honour thought any real change to the law he had to apply had been wrought.

*Phillips* has since been seen as a case on its own facts, and many experienced prosecutors thought it overly ambitious to have claimed, as did the prosecution in that case, that the non-consent of several other complainants could be relevant to the issue of the consent of the particular complainant in that case.

I think it is fair to say *Phillips* has generated more academic discussion than it has supplied ground for submission and argument in the courts.

Tasmania Police supported the submission of the DPP (Tas).

**6.3.14** In contrast, the Assistant Director of Public Prosecutions expressed the view that legislative change was appropriate to overcome the effect of the decision in *Phillips*:

The one exception of this [no special category of sexual offences] is that probative value could be extended to include evidence that shows the accused has a propensity of forcing persons to have non consensual sexual activity with him where otherwise the evidence meets the criteria of Sections 97 – 101 of the *Evidence Act*.

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<sup>417</sup> *WKD v Western Australia* [2005] WASCA 196, [149] (Roberts-Smith JA).

<sup>418</sup> This approach contrasts with the approach of Crawford CJ in *F*, (ruling 13 May 2008) where his Honour considered that there were not strikingly similar features as one of the complainants (aged 4) was only touched on the vagina whereas it was alleged that the older complainants were also touched on the nipples and that the accused had exposed his penis, see further discussion at [3.2.6]-[3.2.7].

<sup>419</sup> National Legal Aid and the Public Defenders Office NSW.

<sup>420</sup> ALRC/NSWLRC, above n 1, [27.219].

<sup>421</sup> Ibid [27.235]. It considered that the real questions was whether sexual offences should be removed from the framework of tendency and coincidence evidence, and, as discussed at [5.4.16], it was not satisfied that a case had been made out.

### **The Institute's view**

**6.3.15** The Institute has carefully considered the literature concerning *Phillips'* case and the submissions received in relation to the impact of the case in Tasmania. In addition, the Institute is mindful of the ALRC/NSWLRC's view that the legislative change is not desirable to overcome the impact of the High Court decision. As discussed, the Commissions considered that there were not sufficient reasons to change the striking similarity test. Further, they considered that legislative changes to overturn the court's rulings on the relevance of multiple complaints to consent would 'be complex and risk introducing new uncertainties'.<sup>422</sup>

**6.3.16** The Institute endorses the critique of the decision in *Phillips* and its view is that the decision misconceives the relevance of evidence of multiple complainants to the issue of consent and the requirement for similarity. The Institute acknowledges that the restrictions contained in the High Court judgment on the relevance of similar fact evidence and the application of the 'striking similarity' test have not been followed in the development of case law in uniform *Evidence Act* jurisdictions to date and considers that there are good reasons why they should not be adopted. However, the Institute's view is that it is too soon to conclude that the decision will not have an impact in such jurisdictions. In light of the legacy of the 'wait and see' attitude adopted to the relevance of concoction to the admissibility of tendency/coincidence evidence under the uniform *Evidence Acts*, the Institute's view is that it is undesirable to wait for greater certainty in the law and to leave open the possibility that the law in Tasmania might adopt the approach of *Phillips*. Accordingly, the Institute recommends legislative reform to forestall any application of the decision in Tasmania.

#### **Recommendation 5**

The *Evidence Act 2001* (Tas), s 55 should be amended to specify that in a trial of two or more charges of sexual crimes, when consent is in issue, evidence may be admitted under the *Evidence Act 2001*, section 97 of a tendency of the accused: (a) to procure participation in sexual acts by force, threats or intimidation; or (b) to engage in sexual acts without an honest and reasonable belief that the sexual acts were consented to.

#### **Recommendation 6**

The *Evidence Act 2001* (Tas), ss 97, 98 and 101 should be amended to specify that in prosecutions for sexual crimes a court is not to rule that evidence the prosecution seeks to adduce under those sections is inadmissible on the basis that the evidence does not have 'striking similarities' with other evidence about the sexual conduct of the defendant.<sup>423</sup>

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<sup>422</sup> ALRC/NSWLRC, above n 1, [27.262].

<sup>423</sup> The recommendation suggested by Cossins, above n 3, (detailed at [6.3.10]) may provide a guide for the wording of the legislative reform.

# 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<br><u>Basis of application:</u> concoction   | Both coincidence and tendency evidence                                     |
| 2  | H         | 17           | 16                 | Partial – reduced to 12 C's<br><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)<br><u>Basis of application:</u> concoction<br>Striking similarity   | Coincidence evidence (also tendency evidence)                              |
| 4  | B         | 2            | 2                  | No<br><u>Basis of application:</u> concoction   | Coincidence evidence (Crown initially characterised as tendency evidence). |
| 5  | Farmer    | 28           | 13                 | Partial 21 counts involving 9 Cs<br><u>Basis of application:</u><br>(1) Concoction (rejected)<br>(2) fair trial (partially successful)  | Coincidence (SFE)  |
| 6  | S [2005]  | 14           | 4                  | Partial<br><u>Basis of application:</u> Contamination (rejected)<br>Similarity (upheld)   | Coincidence and tendency evidence  |
| 7  | E         | 6            | 6                  | Partial<br><u>Basis of application:</u> (1) related events (upheld)<br>(2) concoction/contamination (rejected)  | Coincidence evidence   |
| 8  | Bellemore | 5            | 5                  | Partial (upheld on appeal)<br><u>Basis of application:</u><br>(1) Contamination (successful in regard to W and separate trial ordered).<br>(2) substantially similar (rejected)   | Coincidence evidence   |
| 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.<br>Appears that argued concoction and also specific count with general counts of maintaining sexual relationship under s 125A. | Coincidence evidence   |

Appendix

|    |          |    |   |  |                                   |
|----|----------|----|---|--|-----------------------------------|
|    |          |    |   | 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).  |                                   |
| 11 | Y        | 7  | 6 | No<br><u>Basis of application:</u> concoction  | Tendency evidence                 |
| 12 | Outtram  | 2  | 2 | No (upheld on appeal)<br><u>Basis of application:</u> similarity   | Tendency and coincidence evidence |
| 13 | Ferguson | 3  | 3 | Partial – reduced to 2 C's.<br><u>Basis of application:</u> concoction and similarity of circumstances<br>Successfully on basis of similarity of circumstances | Coincidence evidence              |
| 14 | Coy      | 4  | 4 | No application to sever<br><u>Basis of defence at trial</u> was concoction   | Tendency evidence                 |
| 15 | D        | 5  | 5 | Partial – reduced to 4 C's<br><u>Basis of application:</u> concoction and similarity<br>Successful on basis of similarity of circumstances                     | Coincidence evidence              |
| 16 | M        | 2  | 2 | Not joined by Crown<br>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<br>Self-represented at trial   | unknown                           |
| 18 | H        | 2  | 2 | Yes<br>One NG and other not proceed<br><u>Basis of application:</u> concoction or contamination  | Tendency evidence                 |
| 19 | McLean   | 1  | 1 | No application to sever. Application related to admissibility of tendency evidence<br><u>Basis of application:</u> similarity and concoction                   | Tendency evidence                 |
| 20 | L        | 10 | 4 | No<br><u>Basis of application:</u> concoction and similarity   | Tendency evidence                 |
| 21 | F        | 6  | 4 | Yes<br>Two pleas of guilty, one nolle prosequi and one guilty at trial<br><u>Basis of application:</u> concoction and similarity                               | Tendency and coincidence evidence |