NSW GOVERNMENT Justice

Options Paper

Reform options to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings

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1. Background

1.1 The Council of Attorneys-General (**CAG**) established the Admissibility of tendency and coincidence evidence Working Group (**the Working Group**) in late 2017. CAG tasked the Working Group with developing a proposal to reform the Uniform Evidence Law (**UEL**) to facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings.

1.2 The Working Group was established in response to a recommendation made by the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**) to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials (Criminal Justice Report, Recommendation 44). The Royal Commission made a number of related recommendations, which are set out in **Appendix 1**.

1.3 In March 2018, the Working Group Secretariat developed a Scoping Paper outlining a range of potential reform directions (**Appendix 3**). The Scoping Paper covered all of the reforms recommended by the Royal Commission, as well as several alternative reforms that might also facilitate greater admissibility of tendency and coincidence evidence.

1.4 The Working Group, which includes representatives from all Australian jurisdictions, has considered the Scoping Paper. The Working Group has also been assisted by preliminary consultations with a group of stakeholders, principally from NSW, representing various participants across the legal system. A list of those stakeholders is at **Appendix 2**.

1.5 The Options Paper has been prepared on the basis, consistent with the preliminary views expressed by the Working Group and stakeholders, that there is merit in reforming the test for admissibility of tendency and coincidence evidence in some way to facilitate greater admissibility of that evidence, but that there are preferable alternative approaches to doing so than the particular model that was put forward by the Royal Commission.

2. Purpose of this Options Paper

2.1 This Options Paper does not repeat the legislative and policy detail covered in the Scoping Paper and, therefore, should be read in conjunction with that document.

2.2 Part 3 of the Paper outlines three options for reform of the test for admissibility. These are referred to as Options A, B and C. Each Option describes the proposed amendment to what is known as the 'first limb' of the test (sections 97 and 98 of the UEL) and the 'second limb' of the test (section 101 of the UEL). Broadly speaking, the Options propose progressively wider reforms to the existing test, with Option A offering the least change, and Option C the most.

2.3 A list of five 'supplementary reforms' to other areas of the UEL follows, any or all of which could be combined with Options A, B or C. Some of the supplementary reforms have already been legislated in some jurisdictions.

2.4 Part 4 of the Paper briefly discusses the Options and supplementary reforms, outlining the rationale behind their selection over other possible reform directions.

2.5 All of the Options broadly align with the objectives of Royal Commission Recommendation 44, as they would reform 'the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences … to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials' (although the Options would apply beyond prosecutions for child sexual abuse offences).

2.6 Further, some of the supplementary reform options are drawn directly from Royal Commission recommendations, and, where this is the case, the Royal Commission recommendations are identified below.

2.7 It is important to note that the Working Group does not propose a departure from the specific reforms recommended by the Royal Commission lightly, and the compatibility of the Options put forward with the spirit of the Royal Commission's recommendations has been closely considered. The rationale for moving away from the specific approach recommended by the Royal Commission is discussed in detail in Part 5 of this Paper.

2.8 The Working Group is inviting confidential stakeholder feedback on the reform Options and supplementary reforms presented in this Paper. In particular, the Working Group welcomes input on which Option for reform of the test is favoured and why, as well as on which, if any, supplementary reforms should be pursued.

2.9 Drawing on feedback provided, the Working Group will work towards developing a reform proposal to present to CAG for consideration by late 2018.

3. Options for reform – summary

Option A

First limb of the test	Retain the existing first limb of the test (*retain the requirement for the evidence to have 'significant probative value'*)
Second limb of the test	Replace the existing second limb of the test with a test that provides that tendency or coincidence evidence about a defendant that is adduced by the prosecution is not admissible unless the probative value of the evidence outweighs any prejudicial effect it may have on the defendant *(replace the requirement for the probative value to 'substantially' outweigh any prejudicial effect with a requirement for the probative value to 'outweigh' any prejudicial effect)*

Option B

First limb of the test	Retain the existing first limb of the test, but legislate to clarify its meaning *(retain the requirement for the evidence to have 'significant probative value', but clarify the meaning of that test in line with recent case law)*
Second limb of the test	Replace the existing second limb of the test with a test that provides that tendency or coincidence evidence about a defendant that is adduced by the prosecution is not admissible unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant in the proceedings as a whole (*replace the requirement for the probative value to 'substantially' outweigh prejudice with a requirement for the probative value to outweigh the danger of unfair prejudice to the defendant in the proceedings as a whole*)

Option C

First limb of the test	Replace the existing first limb of the test with a test of probative value (*replace the requirement for the probative value to be 'significant' with a test of probative value*)
Second limb of the test	Replace the existing second limb of the test with a test that provides that tendency or coincidence evidence about a defendant that is adduced by the prosecution is not admissible unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant in the proceedings as a whole (*replace the requirement for the probative value to 'substantially' outweigh prejudice with a requirement for the probative value to outweigh the danger of unfair prejudice to the defendant in the proceedings as a whole*)

Supplementary reform options

1.	Introduce a legislative presumption in favour of **joint trials** in circumstances where a defendant has been accused of multiple offences, in respect of which the prosecution is seeking to lead tendency or coincidence evidence.
2.	Introduce a provision to explicitly provide that the possibility of **concoction, collusion or contamination** should not be considered in the application of the test for admissibility of tendency or coincidence evidence. *(Royal Commission Recommendation 47)*
3.	Clarify the requisite **standard of proof** by introducing a provision to explicitly provide that 'Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt'. *(Royal Commission Recommendation 48)*
4.	Introduce a provision to explicitly provide that coincidence evidence can cover circumstances where there are similarities in the accounts of multiple witnesses that make it improbable that they are lying ('**improbability of lies**').
5.	Introduce a provision to explicitly provide that 'any principle or rule of the **common law or equity** that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant in criminal proceedings'. *(Royal Commission Recommendation 46)*

4. Options for reform – discussion

4.1 The discussion below outlines why the reform Options have been presented, and why other reform directions that were canvassed in the Scoping paper and considered earlier by the Working Group have not been included.

4.2 For clarity, the content is divided into discussion of the Options to reform the first and second limbs of the test, and discussion of each of the supplementary reforms.

Reforming the first limb of the test for admissibility

Option A

4.3 Option A is to retain the first limb of the test in its current form.

4.4 After the Royal Commission released its recommendations in this area, the decision of the High Court in *Hughes v The Queen* [2017] HCA 20 ('*Hughes*') was handed down, which considered the first limb of the test for the admissibility of tendency evidence in favour of a relatively broad interpretation. There may be a view that there is no longer a need for any reform to the first limb of the test following the *Hughes* decision.

4.5 There may be concerns that any change to the test that could lead to an even broader interpretation of 'significant probative value' could be unfair to accused persons.

4.6 Option A is the only approach that would maintain uniformity of the first limb of the test in civil and criminal proceedings (as the reform proposal will only apply to criminal proceedings).

Option B

4.7 Option B is to retain the test of 'significant probative value', but to legislate to clarify the meaning of that test in line with recent case law.

4.8 This Option reflects a suggestion that, even if the High Court's decision in *Hughes* means that substantial amendment to the first limb of the test is no longer necessary, clarification of the test by providing legislative certainty in line with that judicial authority would still be beneficial.

4.9 This Option would address any remaining uncertainty around the test, without departing from the now-settled law.

4.10 As the changes are only proposed to be made in respect of the admissibility of tendency and coincidence evidence in criminal proceedings (and not in civil proceedings), there is a risk with this Option that future judicial authority may result in divergence between the construction of 'significant probative value' in criminal cases (and codified in legislation) and the meaning of that same term in civil cases (as developed through case law).

Option C

4.11 Option C is to replace the existing first limb of the test with a test of 'probative value', such that the evidence would be admissible if it has probative value, whether or not that probative value is 'significant'.

4.12 Option C would introduce the lowest threshold for the first limb of the test and, in that way, it is the Option that is most comparable to the test recommended by the Royal Commission.

4.13 That said, particularly in light of the *Hughes* decision, there may be a view that adopting Option C may not, in practice, facilitate greater admissibility of tendency and coincidence evidence unless an amendment to the second limb of the test is also made.

Other options in the Scoping Paper that are not being pursued

4.14 The option of adopting the test recommended by the Royal Commission, which relates to 'relevance to an important evidentiary issue', was also outlined in the Scoping Paper.

4.15 This reform direction has not been included as an option in this Paper. The Royal Commission's proposed phrasing is not currently a part of the UEL, and it is unclear how it would be interpreted or whether it would in fact facilitate greater admissibility of tendency and coincidence evidence in practice. Adopting this phrasing would also mean that existing case law would no longer apply. For these reasons, preliminary consultation suggests that this option would not be supported by stakeholders.

Reforming the second limb of the test for admissibility

Option A

4.16 Option A would replace the existing second limb of the test with a test that provides that tendency evidence or coincidence evidence about a defendant that is adduced by the prosecution is not admissible unless the probative value of the evidence outweighs any prejudicial effect it may have on the defendant

4.17 This Option would remove the requirement for the probative value to 'substantially' outweigh any prejudicial effect, and represents the simplest way to address the potentially unjustified asymmetry in the second limb of the existing test, while still protecting the defendant from the risk of prejudice.

4.18 It may be argued that this reform would almost make the test the inversion of section 137 ('*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*'). However, section 137 operates differently, principally in that the section 137 test places the burden is on the defendant. Unlike section 137, Option A would also exclude evidence where the court thinks that the probative value and prejudicial risk of the evidence is equal.

4.19 The test proposed in Option A has already been adopted in some international jurisdictions, including Canada and New Zealand.

Option B and Option C

4.20 Options B and C would replace the second limb of the existing test with a test that provides that tendency or coincidence evidence about a defendant that is adduced by the prosecution is not admissible unless the probative value of the evidence outweighs danger of unfair prejudice to the defendant in the proceedings as a whole.

4.21 These Options would address the asymmetry in the test in the same way as that proposed in Option A (removing the requirement for the probative value to 'substantially' outweigh any prejudicial effect), however, Options B and C would also amend the wording used to describe the risk of prejudice.

4.22 At present, the second limb of the existing test states that the probative value of the evidence must '*substantially*' outweigh '*any* prejudicial effect it may have on the defendant'. The reforms outlined in Options B and C would amend the test by focusing on the danger of unfair prejudice to the defendant in the proceedings *as a whole*.

4.23 Reframing the description of prejudicial risk in the second limb of the test to refer to the 'danger of unfair prejudice to the defendant' (like section 137) would make explicit that the court should consider *unfair* prejudice to the defendant (although the test is already understood to have that meaning).

4.24 Additionally, the wording proposed in Options B and C would require the court to consider the danger of unfair prejudice in the proceedings as a whole. This reflects the fact that balancing the probative value and prejudicial risk of the evidence should involve consideration of the prosecution case as a whole, the possible curing effect of jury directions, and any evidence led by the defendant. In that sense, Options B and C adopt aspects of the Royal Commission's recommended approach.

Other options in the Scoping Paper that are not being pursued

4.25 The Scoping Paper included a number of other possible ways to amend the second limb of the existing test that have not been put forward in this Paper due to concerns expressed by jurisdictions and in preliminary consultations with stakeholders.

4.26 The Royal Commission's recommended test would only exclude evidence if admission of the evidence would be 'more likely than not to result in the proceeding being unfair to the defendant'. This departure from the current framework places a heavy burden on the accused. Similarly, a test involving public interest considerations risks importing uncertainty into the law by way of untested language, and could imply that there may be some public interest in admitting evidence irrespective of any prejudice to the accused.

4.27 Other alternatives not pursued were the removal of the second limb altogether, such that evidence would be admissible if it met the first limb, or and retaining the second limb in its current form without any amendment. These suggestions were not widely supported by jurisdictions, or in preliminary consultations with stakeholders.

4.28 In terms of whether the second limb of the test should be amended to include a requirement that evidence should only be excluded due to the risk of prejudice, if the prejudice cannot be mitigated or cured by jury directions, preliminary consultations suggested that this was unnecessary, as jury directions can already be used at common law. Options B and C would, in effect, incorporate the consideration of jury directions by directing attention to the potential unfairness to the accused in the proceedings as a whole.

Supplementary reforms in other areas of the UEL

4.29 A number of potential reform directions that would amend other areas of the UEL were outlined in the Scoping Paper. Several received support from stakeholders, and have been included as supplementary reforms that could be introduced alongside amendments to the test for admissibility.

1 – Joint trials

4.30 The first possible supplementary reform is to introduce a legislative presumption in favour of joint trials in circumstances where a defendant has been accused of multiple offences, in respect of which the prosecution is seeking to lead tendency or coincidence evidence.

4.31 This supplementary reform would provide greater certainty in proceedings, which would benefit parties, complainants and witnesses. It is also in line with community expectations that the fact finder would be made aware of all comparable allegations against an accused person.

4.32 The need for this reform could depend on what other amendments to the test for admissibility are introduced. If the reformed test enables more tendency and coincidence evidence to be adduced, this presumption would be unnecessary if that evidence is cross-admissible. Conversely, a presumption may be ineffective if not combined with other reforms.

2 – Concoction, collusion or contamination

4.33 The second possible supplementary reform is to introduce a provision to explicitly provide that the possibility of concoction, collusion or contamination should not be considered in the application of the test for admissibility of tendency or coincidence evidence.

4.34 Jurisdictions and stakeholders consulted to date have indicated that the possibility of concoction, collusion or contamination should not be considered in the application of the test for admissibility of tendency or coincidence evidence, and introducing a provision to explicitly provide this could be useful to provide clarity in the UEL.

3 – Standard of proof

4.35 The third supplementary reform is to introduce a provision to explicitly provide that 'tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt'.

4.36 This would clarify that tendency and coincidence evidence is not subject to a higher standard of proof. This clarification was recommended by the Royal Commission.

4.37 Tendency and coincidence evidence is not required to be proved beyond reasonable doubt, but there may be some concern that legislating in this area exceeds the mandate of the Working Group (since it relates to the rules of proof). Nonetheless, given the broad agreement on the standard, this reform could bring beneficial clarity to this area of law in order to help facilitate greater admissibility of tendency evidence.

4 – Improbability of lies evidence

4.38 The fourth supplementary reform is to introduce a provision to explicitly provide that coincidence evidence can cover circumstances where there are similarities in the accounts of multiple witnesses that make it improbable that they are lying. This is described as 'improbability of lies' evidence.

4.39 This is accepted as a form of coincidence reasoning under section 98, but is drawn from the common law on propensity evidence. This form of reasoning is particularly applicable in multiple complainant sexual offence cases, because of the commonality with which repeat child sexual abuse occurs, often (but not always) in similar contexts, such as abuse in a family, or an institution. The articulation of this form of reasoning may more clearly outline this avenue for the admissibility of evidence in multiple complainant child sexual abuse cases.

5 – Excluding common law or equity

4.40 Lastly, legislation in UEL jurisdictions could explicitly exclude the application of 'any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence'.

4.41 This reform direction was not outlined in the Scoping Paper, but warrants further consideration in consultation with stakeholders, as it would address issues relating to the continued reference of courts to the common law. It also replicates a recommendation of the Royal Commission.

Other supplementary reforms outlined in the Scoping Paper that are not being pursued

4.42 The Scoping Paper also raised the possibility of legislating to provide that prior convictions could be admissible as tendency or coincidence evidence (if they otherwise satisfy the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution). This reform was recommended by the Royal Commission (Recommendation 49).

4.43 In preliminary consultations, some stakeholders interpreted this supplementary reform as suggesting that prior convictions would be considered admissible without sufficient consideration of relevance. This reform direction has not been put forward as a potential supplementary reform.

5. Departure from the recommendations of the Royal Commission

5.1 As noted above, the Royal Commission recommended amending the test for admissibility of tendency and coincidence evidence under the UEL to facilitate greater admissibility of that evidence as part of the prosecution case in child sexual abuse proceedings (Recommendation 44). The Royal Commission made a number of related recommendations (Recommendations 45 to 49) and developed a proposed model for legislative reform, which it suggested should be implemented to achieve its recommendations (Recommendations 50 and 51).

5.2 The Options outlined above would meet Recommendation 44, as they would facilitate greater admissibility of tendency and coincidence evidence. If some of the supplementary reform proposals are also pursed, jurisdictions could also meet some of Recommendations 45 to 49.

5.3 However, the Options proposed would not implement Recommendations 50 and 51, as any legislation introduced to adopt the Options will not strictly align with the legislative model for reform recommended by the Royal Commission.

5.4 Options that depart from the Royal Commission's model have been presented because, despite the comprehensive and important work of the Royal Commission on this area of law, most jurisdictions preferred alternative reform proposals to achieve the spirit of the recommendations made by the Royal Commission.

5.5 This Paper has already outlined some of the specific issues raised by stakeholders about the Royal Commission's recommendations. However, a range of general concerns about the Royal Commission's recommendations in relation to tendency and coincidence evidence have been raised by jurisdictions, partitioners and others.

5.6 Some of the broad concerns raised include:

- In line with its Terms of Reference, the Royal Commission's recommendations focused exclusively on child sexual assault proceedings, which the Royal Commission acknowledged was problematic. Since the Working Group is not subject to the same scope as the Royal Commission, the Working Group has already agreed that the reform should apply to all criminal proceedings. This will ensure consistent application across such proceedings.

- The model Bill proposed by the Royal Commission would not sit well within the framework of the UEL. The tendency and coincidence evidence provisions are exclusionary provisions, with the test for admissibility providing an exception. The Royal Commission model would import an inclusionary provision into the exclusion framework (such that the accused person in child sexual offence proceedings would have to demonstrate that evidence should be excluded). This approach would add needless complexity to the UEL. It could not be cured, as it is a structural part of the recommendations.

- An approach that places the onus on the accused is also problematic because the existing provisions have a role in ensuring that criminal proceedings are fair to the accused. Stakeholders have emphasised that reform must not lead to any diminution of the right to a fair trial, and most felt that reversing the onus onto the accused person would certainly do that. It was also noted that this burden would be particularly troubling where the accused person is self-represented, as is likely to be the case in Local Court proceedings. Stakeholder comments made clear that they did not believe that a test that assumes tendency and coincidence evidence should be admissible could be introduced without undermining the right to a fair trial. The Options presented in this Paper retain the onus on the prosecution to meet the test for admissibility.

- A related issue with the Royal Commission recommendations is that they would involve a significant shift in the balancing test for admissibility. The Royal Commission's proposed test would require evidence to be admissible unless it was 'more likely than not' that it would lead to an unfair trial for the accused person. The vast majority of stakeholders agreed that this does not strike an appropriate balance. It was strongly suggested that shifting the balance to facilitate greater admissibility of tendency and coincidence evidence should not favour admissibility where there is such a high risk of an unfair trial. The Options presented in this Paper are designed to facilitate the greater admissibility of evidence, without tipping the balance into unfairness.

- The Royal Commission recommendations would exclude the operation of sections 135 and 137 of the UEL. It is anticipated that this movement away from the UEL framework would also be opposed by most stakeholders. The Options presented in this Paper do not exclude the operation of sections 135 and 137 of the UEL.

- Finally, the approach taken by the Royal Commission would lead to uncertainty (particularly as the introduction of untested concepts would be expected to lead to increased appellate action). While the Options presented in the Paper would also result in reform to the current UEL, they would not lead to high levels of uncertainty and would retain the benefit of the body of case law, including the recent High Court consideration of the provisions.

5.7 It is important that any reforms in this area facilitate certainty in criminal proceedings as far as possible, and should be incremental so as to avoid unintended consequences. This is reflected in the Options outlined in this Paper. In particular, all of the Options presented provide incremental steps that work within the existing framework of the UEL and do not introduce untested concepts into the test. The Options presented are designed to offer the greatest prospect of achieving the Royal Commission's primary objective of facilitating greater admission of tendency and coincidence evidence in criminal proceedings.

5.8 The Options presented in this Paper represent alternative approaches that seek to achieve the objectives of the Royal Commission's recommendations within the existing framework of the UEL. They will also mitigate concerns expressed about the Royal Commission's specific proposals, and will promote reform that is likely to be applied in a predictable way, without unintended or unforeseen consequences.

6. Next steps

6.1 This Paper has outlined a range of Options to reform the test for admissibility of tendency and coincidence evidence in criminal proceedings, as well as supplementary reforms to other parts of the UEL. Stakeholders are invited to provide feedback on the Options and supplementary reforms presented.

6.2 The Working Group will closely consider the feedback of stakeholders in the development of a reform proposal.

Appendix 1

Royal Commission Recommendations on admissibility of tendency and coincidence evidence

Recommendation 44

In order to ensure justice for complainants and the community, the laws governing the admissibility of tendency and coincidence evidence in prosecutions for child sexual abuse offences should be reformed to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials.

Recommendation 45

Tendency or coincidence evidence about the defendant in a child sexual offence prosecution should be admissible:

a. if the court thinks that the evidence will, either by itself or having regard to the other evidence, be 'relevant to an important evidentiary issue' in the proceeding, with each of the following kinds of evidence defined to be 'relevant to an important evidentiary issue' in a child sexual offence proceeding:

i. evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding

ii. evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole

b. unless, on the application of the defendant, the court thinks, having regard to the particular circumstances of the proceeding, that both:

i. admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant

ii. if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

Recommendation 46

Common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution.

Recommendation 47

Issues of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution. The court should determine admissibility on the assumption that the evidence will be accepted as credible and reliable, and the impact of any evidence of concoction, collusion or contamination should be left to the jury or other fact-finder.

Recommendation 48

Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt.

Recommendation 49

Evidence of:

a. the defendant's prior convictions

b. acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted)

should be admissible as tendency or coincidence evidence if it otherwise satisfies the test for admissibility of tendency or coincidence evidence about a defendant in a child sexual offence prosecution.

Recommendation 50

Australian governments should introduce legislation to make the reforms we recommend to the rules governing the admissibility of tendency and coincidence evidence.

Recommendation 51

The draft provisions in Appendix N provide for the recommended reforms for Uniform Evidence Act jurisdictions. Legislation to the effect of the draft provisions should be introduced for Uniform Evidence Act jurisdictions and non–Uniform Evidence Act jurisdictions.

Appendix 2

Stakeholders that provided input on the Scoping Paper include:

- Federal Court of Australia
- Supreme Court of NSW
- District Court of NSW
- Local Court of NSW
- Commonwealth Director of Public Prosecutions
- NSW Office of the Director of Public Prosecutions
- Tasmanian Director of Public Prosecutions
- NSW Police Force
- Department of Police, Fire and Emergency Management (Department of Justice, Tasmania)
- Office for Police (NSW Department of Justice)
- Victims Services (NSW Department of Justice)
- Legal Aid NSW
- The Public Defenders (NSW)
- Law Society of NSW
- NSW Bar Association

The views discussed in this Paper reflect the overall feedback, not the comments of any particular stakeholder.

Appendix 3

Scoping paper (attached)

NSW GOVERNMENT Justice

Council of Attorneys-General

Admissibility of Tendency and Coincidence Evidence Working Group

Scoping paper

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Reform context

1. Evidence law governs whether and how information can be considered by the trier of fact in legal proceedings. Under the Uniform Evidence Law (**UEL**), which applies in NSW, Victoria, Tasmania, ACT, NT and the Commonwealth, the general rule is that evidence that is relevant to an issue in the proceedings is admissible. However, a general exclusion applies to some types of evidence (even where relevant) because it is considered unfair to the defendant to admit it.

2. Tendency and coincidence evidence is generally excluded to avoid the risk that the jury will use the evidence to reason impermissibly that the defendant is guilty of the charge because they have acted in a particular way in the past. **Appendix 1** outlines the nature and function of tendency and coincidence evidence, and goes into more detail on the rationale for its exclusion.

3. The exclusion of tendency and coincidence evidence is subject to an exception, which establishes a high legislative burden to overcome the exclusion of the evidence. The tests for admissibility of tendency and coincidence evidence under the UEL and in other Australian jurisdictions are set out at **Appendix 2**.

4. The test for admissibility of tendency and coincidence evidence is critical as it can determine whether the trier of fact is presented with all relevant evidence about the defendant's alleged conduct and, where the defendant is actually charged with offences against more than one victim, it can have a significant impact on whether a joint trial is held.

5. Whether tendency and coincidence evidence is admissible often plays a particularly important role in child sexual abuse proceedings, especially in circumstances where the defendant is accused of abusing multiple children (see **Appendix 1**). For this reason, the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) considered the tests for admissibility of tendency and coincidence evidence in all Australian jurisdictions and made recommendations for reform.

Royal Commission's reform recommendations

6. The Royal Commission found that the tests for admissibility of tendency and coincidence evidence unnecessarily preclude evidence from being admitted in criminal proceedings,[1] unnecessarily prevent joint trials,[2] and lead to 'unwarranted acquittals in prosecutions for child sexual abuse offences'.[3] As a result, it concluded that 'the criminal justice system is failing to provide adequate criminal justice for victims'.[4]

7. The Royal Commission recommended that evidence law should be reformed to facilitate greater admissibility of tendency and coincidence evidence in most Australian jurisdictions, and that such reform should be pursued as a matter of urgency.[5]

8. The Royal Commission made specific recommendations and developed a model Bill to implement its findings. The recommendations and model Bill are outlined at **Appendix 3**.

9. Notably, although the model Bill would depart from the current legislative framework of excluding tendency and coincidence evidence unless it meets a higher legislative burden, it retains a threshold test for admissibility that requires more than relevance to an issue in the proceedings.

Issues with the Royal Commission's model Bill

10. The NSW Department of Justice consulted on the Royal Commission's recommendations and model Bill publicly and with key stakeholders in the NSW criminal justice system (including Heads of Jurisdiction, NSW Police Force, the Office of the Director of Public Prosecutions, Legal Aid NSW, Public Defenders, the NSW Bar Association, and the Law Society of NSW). While many stakeholders accepted that evidence law should be reformed, most were critical of the particular model recommended by the Royal Commission.

11. NSW stakeholders expressed concern that implementing the Royal Commission's model Bill in NSW would:

- lead to inconsistency in the UEL
- make an already complex area of law more difficult to interpret
- unnecessarily introduce new concepts into evidence law, such as relevance to 'an important evidentiary issue'
- add complexity by creating different rules for admissibility of evidence about the defendant in child sexual abuse prosecutions compared to prosecutions for all other types of offences.

12. As to the last point, the Royal Commission itself acknowledged that creating a separate evidentiary regime would pose difficulties, particularly where it would result in two separate evidentiary regimes operating for evidence adduced against the defendant in a proceeding (for example, because a child sexual offence is charged on the same indictment as another offence). NSW stakeholders did not support rectifying this issue by implementing the Royal Commission's model Bill more broadly.

13. Further, tendency and coincidence evidence can be critical in prosecuting defendants in matters not related to child sexual abuse, including those who are accused of sexual offences against multiple adult victims and in civil and criminal proceedings more generally. The recommendations only address the test for admissibility of tendency and coincidence evidence in limited circumstances, and should be considered in that light.

14. Additionally, NSW stakeholders suggested that it was not clear that the model Bill would, in fact, facilitate greater admissibility of tendency and coincidence evidence in child sexual abuse proceedings. They opposed undertaking this reform without any certainty that it would have the intended impact in those proceedings.

Formation and purpose of the Working Group

15. In light of the importance of the model UEL project and NSW stakeholders' concerns, NSW sought to bring jurisdictions together to carefully consider the test for the admissibility of tendency and coincidence evidence and develop an agreed reform proposal to address the Royal Commission's findings. This would allow for the development of a reform proposal of broader application which, if agreed, could be implemented consistently (at least in UEL jurisdictions).

16. NSW proposed that approach to other jurisdictions at the 1 December 2017 meeting of the Council of Attorneys-General (**CAG**). At the meeting, CAG:

    - noted Recommendations 44-51 of the Royal Commission in its Criminal Justice Report in relation to the admissibility of tendency and coincidence evidence
    - agreed to refer the test for admissibility in the UEL to a Working Group including representatives from uniform evidence jurisdictions, led by NSW, which will report back to CAG with a reform proposal in the second half of 2018.

17. The Admissibility of Tendency and Coincidence Evidence Working Group (**the Working Group**) was established in early 2018. The Working Group comprises representatives from all UEL jurisdictions. Non-UEL jurisdictions were invited to participate as observers.

18. As agreed by CAG, the Working Group will develop a proposal to reform the test for admissibility of tendency and coincidence evidence under the UEL. This Scoping Paper sets out the agreed scope and focus of the Working Group's project.

19. A progress report will be provided to CAG at its first meeting in 2018, with the proposal presented for CAG consideration at its second meeting of 2018.

20. A fundamental goal of the Working Group is to develop a reform proposal that is agreed by all UEL jurisdictions, to maintain uniformity in the UEL. All jurisdictions should actively engage with the work of the group to support this outcome. If agreement cannot be reached, jurisdictions may seek to progress their own reforms to implement the Royal Commission's findings.

Principles for reform

21. When proposing to establish a national Working Group, NSW put the following principles to CAG:

    - reform is needed to facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings
    - reform should not only apply to child sexual abuse proceedings
    - reform should balance the desirability of facilitating greater admissibility of tendency and coincidence evidence with the importance of ensuring a fair trial for the defendant.

22. In agreeing to establish the Working Group, CAG accepted these principles as the starting point for reform.

23. Building on these principles, the Working Group has adopted two further principles to guide reform:

    - there should be some additional threshold set by legislation (beyond the provisions that apply to other evidence) that tendency and coincidence evidence must meet before being admissible
    - the Working Group will only investigate reforming the test for admissibility in criminal proceedings, and will not consider or propose any reform to the test in civil proceedings.

24. Together, these reform principles reflect the fact that the Working Group was established to develop a reform proposal to facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings, following recommendations made by the Royal Commission in relation to child sexual abuse proceedings. They also reflect the fact that, although reform is needed to facilitate greater admissibility, there is still a real risk that such evidence may undermine the right to a fair trial and so use of such evidence in criminal proceedings needs to be subject to a higher admissibility threshold than other forms of evidence.

25. The principles for reform represent the starting point for the Working Group's consideration of the test for admissibility of tendency and coincidence evidence, and will underpin the reform proposal.

26. The principles recognise an intention to maintain the application of the relevant provisions of the UEL consistently to all criminal proceedings. Importantly, this approach will require the Working Group to undertake careful consideration of the admissibility of tendency and coincidence evidence as part of the prosecution case in all types of criminal proceedings, including those that do not relate to child sexual abuse.

27. In order to do this, the Working Group must examine the issues identified in this Scoping Paper in that broader context, and also conduct further research into the operation of the test for admissibility of tendency and coincidence evidence in other types of criminal proceedings. This work will ensure that the Working Group understands the potential impact of a test to facilitate greater admissibility of tendency and coincidence evidence in the types of criminal proceedings that the Royal Commission did not consider, and will avoid a reform proposal being put forward which may have unintended consequences in those proceedings.

Reform directions

28. As outlined at **Appendix 2**, tendency and coincidence evidence about the defendant is admissible in criminal proceedings under the UEL test if:

    1) the evidence has significant probative value, and
    2) the probative value of the evidence substantially outweighs any prejudicial effect it might have on the defendant.

29. In effect, these requirements establish a two-limb test for the admissibility of evidence about defendants in criminal proceedings. The second limb is not applicable in civil proceedings, so the evidence is only required to have significant probative value.

30. The Royal Commission recommended substantially modifying both limbs of the test to facilitate increased admissibility of evidence about defendants in criminal proceedings, but its model still retains the same two limb structure.

31. There are a number of alternative ways that the UEL test for admissibility of tendency and coincidence evidence could be reformed. This section outlines several potential directions for reform. For ease, the discussion of possible reform directions is divided into:

    - reforms affecting the first limb of the test
    - reforms affecting the second limb of the test
    - other reforms

32. Some of the reform directions represent alternative approaches, while some could be adopted in combination (for example, amendments to both the first and second limbs could be pursued).

33. The reform directions outlined in this section are based on consideration of the current test for admissibility under the UEL, the findings and recommendations of the Royal Commission, existing tests in other jurisdictions (namely, Western Australia, New Zealand and the United Kingdom), and suggestions made by stakeholders to the Royal Commission and during later NSW consultation. Importantly, while the Working Group will closely consider the model Bill in this context, the reform proposal will not be restricted to the Royal Commission's approach.

34. Additionally, the Australian Law Reform Commission (ALRC), jointly with the NSW Law Reform Commission, released *Uniform Evidence Law* (ALRC Report 102) in 2006. While the ALRC's recommendations in relation to tendency and coincidence evidence were implemented in 2007, the report has been considered in developing the reform directions outlined below.

35. The Working Group will consider these reform directions in order to develop and agree a reform proposal.

The first limb of the test for admissibility

36. Sections 97 and 98 of the *Evidence Act 1995* comprise the first limb of the test for admissibility (of tendency and coincidence evidence, respectively). The relevant part of this test can be summarised as follows:

> Tendency and coincidence evidence is not admissible unless 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*.

37. The framing of the test places the burden on the party seeking to lead the tendency and/or coincidence evidence, most frequently the prosecution, to persuade the court that the evidence should be admitted.

38. The Royal Commission was critical of the 'significant probative value' test, due mainly to the restrictive interpretation of the phrase in UEL jurisdictions.[6]

39. In light of the Royal Commission's findings, the Working Group will consider three reform directions:

    - a test of 'probative value' (rather than 'significant probative value')
    - a test of 'relevance to an important evidentiary issue' (or similar)
    - an amended test of 'significant probative value'

40. These potential reform directions are discussed in detail below.

41. Importantly, any amendment to the first limb of the test for admissibility will be made in respect of criminal proceedings only. This will avoid any unintended impact on civil proceedings, and is consistent with the separate provisions for civil and criminal proceedings already provided for in other parts of the UEL (including in the second limb of the test).

A test of probative value

42. Under section 55 of the *Evidence Act 1995*, evidence is relevant if it 'could, if it were accepted, rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding'. This is very similar to the definition of 'probative value' in the dictionary to the Act, which provides that 'probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'.

43. Subject to other rules about admissibility, all relevant evidence is admissible and irrelevant evidence is not admissible: section 56 of the *Evidence Act 1995.* This means that the general position is that evidence with probative value is by definition relevant and, thus, *prima facie* admissible.

44. The Royal Commission reported that some stakeholders considered that no threshold requirement beyond evidence having relevance should be established for tendency and coincidence evidence to be admitted under the first limb of the test of admissibility. The rationale for a test of probative value is that, once evidence has been determined to be relevant (and, thus, presumably has some probative value), it is not possible for the judge to objectively measure whether the probative value of the evidence is significant or non-significant. It is up to the trier of fact to determine what weight should be put on the evidence.

45. Adopting a test of probative value would substantially ease the burden on the party seeking to lead tendency and/or coincidence evidence to persuade the judge that the evidence should be admitted.

46. However, it is not clear that this on its own would lead to greater admissibility of tendency and coincidence evidence in criminal proceedings in practice. Where evidence has some probative value, but is not of significant probative value, it may not be able to overcome the hurdle established by the second limb of the test for admissibility (even if the formulation of that test is also reformed). It is anticipated that any form of the test will require the court to undertake some balancing of the probative value of the evidence against the risk of prejudice in considering whether the evidence should be admitted, and that most judges will form the view that tendency or coincidence evidence has some prejudicial effect in criminal proceedings. Evidence that is relevant, but that does not have 'significant' probative value, may not be admissible in these circumstances.

47. Further, under section 135 of the *Evidence Act 1995*, the court may refuse to admit evidence if its probative value is 'substantially outweighed' by the danger that the evidence might, for example, be unfairly prejudicial to a party. Under section 137, 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 in a criminal proceeding. If the evidence does not have a significant probative value, it is more likely that it will be captured by the balancing undertaken by the court pursuant to these discretionary and mandatory exclusions.

A test of relevance to an important evidentiary issue

48. The Royal Commission recommended that the 'first limb of the test for admissibility should reflect a test of relevance but with some enhancement'.[7] It recommended that the 'enhancement' should be a requirement that the tendency or coincidence evidence be 'relevant to an important evidentiary issue' in the case.[8] This test is proposed in the model Bill (Schedule 1, proposed section 97(2)(b) for tendency evidence and proposed section 98(2)(b) for coincidence evidence).

49. The Royal Commission's recommended approach was based largely on the approach in the United Kingdom.[9] It provides that, in criminal proceedings, evidence of a defendant's bad character is admissible if, amongst other things, it 'is relevant to an important matter in issue between the defendant and the prosecution': section 101 of the *Criminal Justice Act 2003* (UK).

50. In the *Criminal Justice Act 2003* (UK), a 'matter in issue between the defendant and the prosecution' is defined to include 'the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence': section 103(1)(b). This clearly captures evidence being led to prove tendency. It does not, however, define when this matter will be 'important' (although it appears that is not a high bar in practice).

51. Adopting a test of relevance to an important evidentiary issue would retain a burden on the party seeking to lead tendency/coincidence evidence to persuade the judge that the evidence should be admitted, as it would need to demonstrate the probative value to the 'important evidentiary issue'. This burden may be lower than a requirement to prove that the evidence has a significant probative value.

52. However, as noted above, stakeholders raised some concerns about the introduction of the concept 'important evidentiary issue', as it is not a part of existing evidence law. It is not clear whether the phrase 'important evidentiary issue' would be interpreted in the same way as 'an important matter in issue between the defendant and the prosecution' is in the United Kingdom. In this context, it may not lower the burden on the prosecution to demonstrate that the evidence should be admissible.

An amended test of significant probative value

53. An alternative approach to reform would be to retain the requirement for evidence to have 'significant probative value', but to broaden or clarify the meaning of that phrase.

54. The requirement to be of 'significant probative value' means the evidence must be 'of such a nature that it could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent — that is, more than is required by s 55 to establish relevance'.[10] This requires the judge to consider the nature of the fact in issue to which the evidence is said to be relevant and the significance that the evidence may have in establishing that fact in the mind of the trier of fact.

55. There has been some debate in Australian jurisprudence as to whether probative value relies on establishing a similarity between the conduct at issue in the proceedings and the conduct described in the tendency or coincidence evidence. This was resolved, to a large degree, by the recent High Court decision in *Hughes v The Queen* [2017] HCA 20. In that case, the High Court found that the admission of tendency evidence under the *Evidence Act 1995* is not conditional on 'operative features of similarity' between the tendency and the conduct in issue. The evidence at issue was found to have significant probative value because it showed the appellant's tendency to engage in sexual activity with children where there was a high risk of discovery by others.

56. However, *Hughes* leaves open the possibility that some level of similarity is required. It is also not clear from *Hughes* whether the majority would admit tendency evidence where the tendency relied on is a tendency to act on a sexual interest in children. Additionally, the High Court also did not decide whether the significant probative value of the evidence was enough to meet the second limb of the test of admissibility. These aspects of the operation of the test for admissibility could be clarified by legislative reform.

57. The Royal Commission found that, although similarity can be useful for establishing probative value, it should not be determinative. That is, there should be no requirement of additional similarity for tendency evidence to be admissible. The Royal Commission considered that it was unclear why, when two important similarities in criminal behaviour are present – *sexual* offending against a *child*[11] – any further level of similarity between incidents of proven or alleged child sexual abuse, or distinctiveness in the offending, would be required for tendency or coincidence evidence to have significant probative value.[12] The Royal Commission reached that conclusion, in part, because of the evidence about the nature of sexual offending against children and the fact that a single perpetrator often commits child sexual offences in vastly different circumstances.

58. Some NSW stakeholders have suggested that the lack of certainty in the common law should be addressed by clarifying the legislation to provide that there is no particular degree of similarity required for tendency and coincidence evidence to have significant probative value (although similar distinctive conduct may increase the probative value of the evidence). Some NSW stakeholders suggested that, with this clarification, it would be appropriate to retain the existing first limb of the test.

59. While the Royal Commission did not recommend this approach, it would appear to be consistent with the Royal Commission's findings and conclusions.

60. Other issues could also be clarified in the legislation, including that the circumstances in which the defendant engaged in the conduct may be relevant to tendency (not simply the conduct itself) and

that the fact that an alleged tendency is common to a certain type of offending does not detract from its probative value.

61. These approaches could also be pursued in addition to the reform directions outlined above (for example, a test of probative value could be adopted and the meaning of 'probative value' could be legislated).

The second limb of the test for admissibility

62. Section 101 of the *Evidence Act 1995* comprises the second limb of the test for admissibility of tendency and coincidence evidence adduced by the prosecution. The relevant part of this test can be summarised as follows:

> Tendency and coincidence evidence about a defendant in a criminal proceeding is not admissible unless the *probative value of the evidence substantially outweighs any prejudicial effect* it may have on the defendant.

63. The framing of the second limb of the test places a further burden on the prosecution in criminal proceedings to persuade the judge that the evidence should be admitted. It is a significant burden because the balance of probative value versus prejudicial risk is presumptively struck in the accused's favour, such that the probative value of the evidence must *substantially* outweigh its prejudicial risk in order to be admissible. The second limb of the test does not apply in civil proceedings, or to tendency and coincidence evidence adduced by the defence in criminal proceedings (relating to a complainant or another witness).

64. The Working Group will consider the following reform directions:

- reframing the test of probative value versus prejudicial risk
- a test that requires the balance of probative value and prejudicial risk to include assessment of whether the prejudicial risk can be cured by jury directions (and only exclude evidence where the risk cannot be cured)
- a requirement that the evidence be taken at its highest when balancing probative value and prejudicial risk

65. These different reform directions are discussed in detail below. The reform directions may be adopted individually or in combination with each other.

Reframing the test of probative value versus prejudicial risk

66. The Royal Commission did not support the 'unequal weighting of the test in favour of exclusion' in the UEL.[13] It did not understand why the requirement should be to *substantially* outweigh, rather than just outweigh, the risk of prejudice to the defendant,[14] as this asymmetry amounts to a cost/benefit assessment where the evidence will be rejected even where the benefit of the evidence (its probative value) outweighs the possible cost of its admissibility (any risk of prejudice to the defendant).[15]

67. The first possible reform direction is to simply reframe the test so that tendency and coincidence evidence is not admissible unless its probative value outweighs the prejudicial effect it may have on the defendant.

68. Adopting this test for admissibility under the UEL would retain the burden on the prosecution to persuade the court to allow the evidence to be admitted, but would facilitate greater admissibility of evidence by removing the asymmetrical weighting of the test in favour of the defendant. Some stakeholders supported this option in submissions to the Royal Commission.

69. This approach essentially reflects the position in Canada under the common law:

> The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.[16]

70. The same balance is struck in New Zealand, where section 43(1) of the *Evidence Act 2006* (NZ) provides:

> The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.[17]

71. It is notable that the test in New Zealand specifies that the balancing involves consideration of *unfair* prejudice, rather than simply prejudicial effect. If this language was adopted in the test for admissibility under the UEL, it would align with tests more closely with the discretionary and mandatory exclusion under sections 135 and 137 of the *Evidence Act 1995* (which refer to evidence that might be 'unfairly prejudicial to a party' and 'the danger of unfair prejudice to the defendant' respectively).

72. In New Zealand, the *Evidence Act 2006* (NZ) also provides more guidance on how the court should undertake this balancing. Section 43(3) of that Act provides a non-exhaustive list of factors to be considered in assessing probative value and section 43(4) sets out mandatory considerations for the judge regarding prejudicial effect. Under the latter provision, the judge must consider whether:

- the evidence is likely to unfairly predispose the fact-finder against the defendant
- in reaching a verdict, the fact-finder will tend to give disproportionate weight to evidence of other acts or omissions.

73. The Royal Commission did not recommend the above approach to reframing the test of probative value versus prejudicial risk. Instead, it determined that 'there should be provision made to enable a judge to exclude the tendency or coincidence evidence if it is more likely than not to result in the trial, as a whole, being unfair to the accused in a manner that will not be cured by directions'.[18] This conclusion is reflected in the model Bill (Schedule 1, proposed section 98A(1)).

74. Under this test, the court could only exclude evidence if it thinks that both:

- admission of the evidence is more likely than not to result in the proceedings being unfair to the defendant, and
- if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

75. This first part of the test would significantly depart from the current test under the UEL by focusing on the risk of prejudice to the defendant (rather than the probative value of the evidence), as the court would be required to consider whether the evidence would be 'more likely than not' to lead to unfair prejudice. It would involve an assessment of whether the proceedings will be unfair as a whole, rather than whether the tendency and coincidence evidence itself would be unfairly prejudicial.

76. The model Bill would also shift the burden to the defence to make an application to exclude the evidence and then demonstrate that it should be excluded.

77. If adopted, this option would be expected to significantly increase the admissibility of tendency and coincidence evidence. This effect would be furthered by the second part of that test, which will be discussed below.

78. The Royal Commission supported its recommendation by reasoning that the UEL and the Western Australian tests for admissibility have both facilitated greater admissibility of tendency and coincidence evidence than the common law test for many years with 'no suggestion of injustices arising as a result of these changes'.[19] However, the test proposed by the Royal Commission goes significantly further than simply broadening the current UEL test and would probably also facilitate greater admissibility of tendency and coincidence evidence than under the test in Western Australia.

79. In Western Australia, the second limb of the test for admissibility provides that tendency and coincidence evidence is only admissible if:

> …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.[20]

80. The Royal Commission viewed this test as the most liberal in Australia, 'particularly taking into account how it is applied by the Western Australian courts'.[21]

81. The Royal Commission did not make clear why it did not recommend the Western Australian test, but stakeholders made submissions criticising the uncertainty of the language of 'the degree of risk of an unfair trial' and the definition of propensity evidence under the test,[22] as well as the inclusion of a public interest test.[23] A key criticism of the public interest test is that it seems to imply that there may be 'a public interest in an unfair trial in some circumstances; or that the judge would, but for the section, have some view other than that shared by 'fair-minded people''.[24] It may be possible to develop a version of the test that incorporates the ides of the 'public interest' or the 'reasonable person' but addresses these criticisms (for example, the 'interests of justice').

82. Finally, the Working Group could develop a new option for reform which combines beneficial aspects of the balancing tests discussed above. For example, it may consider that the probative value of evidence should be required to outweigh the risk of unfair prejudice in the trial as a whole, rather than outweighing any prejudicial effect of the evidence itself on the defendant (combining reframing the test of probative value versus prejudicial risk with the Royal Commission's test).

83. In considering these reform directions, the Working Group should consider the nature and function of balancing tests of admissibility in the UEL more generally. It should also bear in mind the impact of any reform on the length of trials and the overall public benefit.

Jury directions

84. As noted above, the Royal Commission's proposed test for admissibility includes a second part that provides that evidence should only be excluded due to the risk of prejudice where that prejudice cannot be mitigated by jury directions.

85. Under the model Bill, if directions will remove the risk of unfairness to the defendant, the court is required to give those directions rather than refuse to admit the evidence (proposed section 101A(3)).[25]

86. In NSW, the common law already provides that 'it is legitimate and appropriate for the judge to take into account the ameliorating effect of any directions that may reduce the prejudicial effect' when determining the prejudicial effect that evidence may have on a defendant.[26] Legislating to provide that the evidence should be admissible if the prejudice can be mitigated by jury directions would take this a step further.

87. This requirement could be incorporated into any of the above tests to further facilitate admissibility of tendency and coincidence evidence. It could be framed as a requirement (as in the Royal Commission's test) or a discretion open to the court.

Other issues for consideration

Coincidence reasoning

88. Coincidence evidence is used in different ways depending on the available evidence and what criminal offences it is used to prove.

89. In *Velkoski v The Queen* [2014] VSCA 121 at [175] the Victorian Court of Appeal made reference to the following form of coincidence reasoning:

> there are similarities in the accounts given by two or more witnesses regarding the conduct of the accused which make it improbable, in the absence of concoction or contamination, that the witnesses are telling lies.

90. This is commonly referred to as the 'improbability of lies' theory.[27] This form of reasoning differs from that permitted by the coincidence rule under the UEL, and has drawn criticism because it draws so heavily on the common law.[28]

91. It appears that this form of coincidence reasoning can be particularly useful for the prosecution in sexual offence proceedings with multiple complainants, where a number of victims have a similar account of sexual offending by the accused.

92. The Working Group will consider whether this additional form of coincidence reasoning should be provided for in the UEL to facilitate greater admissibility of coincidence evidence in such cases.

Concoction, collusion or contamination

93. The way a court considers the possibility of concoction, collusion or contamination of evidence can affect whether it is found to be admissible.

94. The Royal Commission recommended that the possibility of concoction, collusion or contamination should not affect the admissibility of tendency or coincidence evidence and, further, the court should apply the tests in relation to tendency and coincidence evidence on the assumption that the evidence will be accepted as credible and reliable.[29] It considered that the possible impact of any evidence of concoction, collusion or contamination should be left to the jury.[30]

95. This recommendation appears to be consistent with the common law. In *IMM v The Queen* [2016] HCA 14, the High Court held that the probative value of tendency and coincidence evidence is to be taken at its highest (that is, it should be assumed that the evidence will be accepted as true), and questions of reliability and credibility should not factor into the assessment of probative value. This means questions of reliability and credibility become a matter for the trier of fact to resolve if the evidence is adduced.

96. However, there is some concern that this case could be interpreted as deciding that potential collusion, concoction or contamination is not relevant to the first limb of the test due to the facts of the case, leaving open the possibility that it may be relevant when considering the second limb of the test (or under other provisions in the UEL). The Victorian DPP submitted to the Royal Commission that, while the issue of concoction or contamination was substantially addressed by the High Court, 'the effect of that judgment should be closely monitored, and legislative reform considered if appropriate'.[31]

97. The Royal Commission recommended this common law position should be explicitly legislated as applying to both limbs of the test. Tasmania has already amended the *Evidence Act 2001* (Tas) to provide that the issue of concoction, collusion or suggestion is not relevant to the admissibility of tendency and coincidence evidence. If this approach was adopted in other jurisdictions, it would make it clear that concoction, collusion or contamination should not be considered in determining the admissibility of tendency or coincidence evidence. It would also prevent any future watering down of this position.

Standard of proof

98. In general, in criminal proceedings it is only the elements of the offence charged that must be proved beyond reasonable doubt. However, the NSW Court of Criminal Appeal determined that tendency evidence should be required to be proved beyond reasonable doubt, at least in child sexual assault cases.[32] This requires both the fact of the act that supports the tendency and that the tendency exists to be proved beyond reasonable doubt. The same requirement does not exist for coincidence evidence.

99. The Royal Commission found 'no reason to insist upon a particular standard of proof for a particular piece of tendency or coincidence evidence'.[33] The Royal Commission suggested that governments should therefore introduce legislation to ensure that tendency and coincidence evidence is not required to be proved beyond reasonable doubt.[34]

100. Victoria has already legislated to provide that a judge may not direct the jury that any matters need to be proved beyond reasonable doubt other than the elements of the offence and the absence

of any defences.[35] This legislation overrides the common law on what jury directions are required in relation to proof beyond reasonable doubt. Other UEL jurisdictions could adopt the same approach (whether in the UEL or under comparable legislation to the Victorian *Jury Directions Act 2015*).

Prior convictions and related conduct

101. Evidence of prior convictions and related conduct, particularly the facts of the prior offending, can assist the trier of fact. The Royal Commission was satisfied that 'prior convictions for child sexual abuse offences should be admissible in prosecutions for child sexual abuse offences',[36] while acknowledging the complexity of the issue.

102. At common law, evidence of prior convictions and related conduct may be admissible as tendency or coincidence evidence as long as the evidence otherwise meets the test for admissibility. However, this position is not legislated in most Australian jurisdictions. Legislating the common law position would ensure that it is clear that prior convictions and related conduct are admissible as tendency or coincidence evidence. However, there may be some debate about what relevance that evidence would have, particularly in criminal proceedings for offences other than child sexual abuse. It may also be useful to consider, as part of this issue, how evidence of prior convictions should be led.

103. The Royal Commission did not recommend legislating to enable the admissibility of evidence of prior acts for which the accused has been acquitted. While the Royal Commission considered that there 'may be circumstances in which evidence of acts for which the defendant has been acquitted should be admissible', it acknowledged that this would also raise 'a number of complex issues'[37], including that the fact that the accused is entitled to the full benefit of the acquittal, and the principles of finality, incontrovertibility and double jeopardy.

104. The Royal Commission suggested that the question of whether evidence of prior acts for which the accused has been acquitted should be considered in detail in the context of future law reform. The Working Group may determine that this is the appropriate forum to undertake that consideration, although it would seem more appropriate to confine the scope of the work to the findings of the Royal Commission in this area.

Joint trials

105. While the Royal Commission was strongly in favour of joint trials, it considered that increasing joint trials would be 'better achieved through increasing the cross-admissibility of evidence from multiple complainants' than by a legislative presumption or specific provision in favour of joint trials.[38] This is because trials are often separated due to tendency and coincidence evidence not being cross-admissible (that is, whether the jury will be allowed to use tendency or coincidence reasoning in considering the evidence on some or all counts in relation to each or some of the other counts). The Royal Commission appeared to reason that increasing admissibility of such evidence would do more to facilitate joint trials than a presumption or provision would.

106. Nonetheless, jurisdictions could consider a legislative presumption or specific provision in favour of joint trials (whether in the absence of, or in addition to, reforming the terms of the first or second limbs of the test). Victoria, Tasmania and Western Australia have legislated such a presumption.

Out of scope

Civil proceedings

107. The Working Group will not consider or propose any reform to the test for admissibility of tendency and coincidence evidence in civil proceedings. As such, if any reform to the first limb of the test is proposed, it will involve introducing a separate first limb of the test to be applied only in criminal proceedings. If required, CAG may be asked to agree that a subsequent reform project examine whether any amendment should be made to the test in civil proceedings.

Collapsing the distinction between tendency and coincidence evidence

108. The Royal Commission discussed whether the UEL should continue to draw a distinction between tendency and coincidence evidence. The Royal Commission ultimately concluded not to recommend reform in relation to this aspect of tendency and coincidence evidence. However, it noted that it anticipated 'that in due course the case for removal of the distinction will be made in another forum and relevant reform will follow'.[39]

109. Collapsing the distinction between tendency and coincidence evidence would represent a complete rethink of the UEL approach to defendants who are accused of offending against multiple victims. Importantly, it would render the common law and UEL understanding of tendency reasoning and coincidence reasoning irrelevant. It is not clear on what basis circumstantial evidence of other offending could be admitted.

110. Collapsing the distinction between tendency and coincidence evidence would not, in and of itself, facilitate greater admissibility of such evidence. It would require the establishment of a new test, based on an alternative form of accepted reasoning.

111. For these reasons, the Working Group will not investigate this approach in the course of its work.

Increased appeals on interlocutory rulings on admissibility

112. The Royal Commission recommended that jurisdictions 'should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right…applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case'.[40] Implementing this recommendation may facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings as it would give the prosecution more opportunities to appeal rulings where it believes the interpretation of the test taken by the court unnecessarily excludes evidence.

113. As the Royal Commission's recommendation suggests, the prosecution right to appeal interlocutory rulings varies across jurisdictions (for example, NSW legislation already provides for the right as recommended). As this issue does not directly relate to admissibility of tendency and coincidence evidence, it is out of scope for this Working Group. Jurisdictions should separately consider this recommendation, and its potential to complement any reform to the test for admissibility, outside of the context of the Working Group.

Admissibility of prior acquittals

114. As discussed above, the Royal Commission did not recommend that jurisdictions should enact legislative reform to explicitly enable evidence of prior acts for which the accused has been acquitted to be admissible in criminal proceedings. Consideration of whether such reform should nonetheless be implemented is out of scope for this Working Group.

Appendix 1 – Tendency and coincidence evidence

1. Tendency evidence is "evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, [adduced] to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind": *Evidence Act 1995* (NSW) section 97(1) and Dictionary. For example, where a person who is charged with child sexual offences has a history of such offences, evidence may be adduced to demonstrate that the accused has a sexual interest in children and a tendency to act on that interest (to show that the accused had that state of mind or acted in that way in the manner alleged). This is known as 'propensity' evidence at common law.

2. Coincidence evidence is defined as "evidence that 2 or more events occurred [adduced] 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": *Evidence Act 1995* (NSW) section 98(1) and Dictionary. For example, if multiple children allege that a person sexually assaulted them in similar circumstances, the prosecution may adduce evidence to demonstrate the improbability of the coincidence of multiple similar, but false, allegations being made. This is known as 'similar fact' evidence at common law.

Importance of tendency and coincidence evidence in child sexual assault proceedings

3. The Royal Commission noted that tendency and coincidence evidence can be critically important in child sexual assault proceedings because such offences are "generally committed in private and with no eyewitnesses [and] no medical or scientific evidence capable of confirming the abuse".[41] The fact at issue in proceedings is often whether the offence/s occurred, rather than the identity of the accused. In these circumstances, the trier of fact is effectively considering the word of the complainant against that of the accused.

4. The Royal Commission also noted that defendants in proceedings for child sexual offences had often offended against multiple victims. This is consistent with studies that suggest that the 'propensity' of such offenders is particularly high.

5. When tendency and coincidence evidence is admissible, it can contribute to the trier of fact concluding that it is more likely that the alleged offence/s occurred as the allegation is supported by evidence from other complainants or witnesses who allege that the accused also sexually abused them. It can also provide crucial support for the complainant's reliability or credibility.

6. Significantly, the admissibility of tendency and coincidence evidence can also impact whether a joint trial is held to determine charges against an accused by multiple complainants,[42] because a joint trial is less likely to proceed where tendency and coincidence evidence is not cross-admissible (and the jury would not be allowed to use tendency or coincidence reasoning with respect to the charges).[43]

7. If a joint trial is not held, there are often restrictions on the evidence that can be adduced and the full picture of the accused's alleged criminality is not presented to the jury. Joint trials can also be important for building a sense of unity and mutual support amongst complainants[44] and can significantly reduce the length, and thus also the cost, of criminal proceedings.

The balance between probative value and prejudicial risk

8. Balancing probative value against the risk of prejudice to the defendant is a key function of the test for admissibility of tendency and coincidence evidence.

Probative value

9. Evidence law in relation to tendency and coincidence evidence recognises that circumstantial evidence of an accused's previous conduct may be logically probative of guilt.[45] However, such evidence can only be considered in the assessment of the probability of the existence of a fact in issue through permissible tendency or coincidence reasoning.

10. Tendency evidence may be probative because it can inform the assessment of the probability of the accused having, or having had, a tendency to act in a particular way or to have or have had a particular state of mind, and whether they acted in a particular way or had the state of mind alleged on an occasion in issue in the proceeding. This reasoning involves considering the tendency and how precisely it correlates to the act or state of mind the accused is alleged to have had on the occasion in issue.

11. The law has traditionally taken the view that tendency evidence has a greater probative value if it possesses a more distinctive common feature with the conduct in issue, as it makes it increasingly rational to reason that it is likely the accused acted in that manner in relation to the charge. However, the High Court recently held that, under the *Evidence Act 1995*, evidence that an adult man had a sexual interest in female children aged under 16 years "and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection", had significant probative value in a trial for a sexual offence involving an underage girl, despite the evidence not displaying specific features similar to the facts in issue.[46]

12. Coincidence evidence, such as evidence of previous similar complaints against an accused, may be adduced to demonstrate that it is improbable that the similar allegations are a coincidence or that all complainants are mistaken or lying. Again, if it is established that the accused committed another offence in a similar manner or circumstances, the law has held that a jury can reason that it is more probable that the accused committed the charged offence.

Prejudicial risk

13. Australian courts' history of preventing tendency or coincidence evidence being adduced due to the risk of prejudice to the accused reflects, at least in part, concern about impermissible jury reasoning.[47] In fact, the Royal Commission suggested that it is this concern, rather than any perceived lack of probative value, that plays the largest role in limiting the admissibility of tendency and coincidence evidence.[48]

14. The Royal Commission identified three ways in which this prejudice is said to manifest:[49]

    - Inter-case conflation prejudice: Juries will confuse or conflate the evidence led to support different charges in a joint trial, so that they will wrongly use evidence relating to one charge in considering another charge.
    - Accumulation prejudice: Juries will assume the accused is guilty due to the number of charges against him or the number of prosecution witnesses, regardless of the strength of the evidence.
    - Character prejudice: Juries will use evidence about the accused's other criminal misconduct and find guilt by reasoning that an accused who has behaved in a certain way once will do so again.

15. The exclusion of tendency and coincidence evidence to prevent such prejudice is seen as the 'duty of a trial judge',[50] especially in sexual offences proceedings, which are said to require special care to ensure that the defendant is not unfairly prejudiced.[51]

16. The Royal Commission expressed doubt about the actual likelihood or incidence of this impermissible reasoning (and resultant unfair prejudice). Research was commissioned that used mock juries to acquire evidence on the actual reasoning process undertaken by juries.[52] The research found that, contrary to assumptions made in the common law, it is "unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a consequence of joinder of counts or the admission of tendency evidence".[53] Instead, "jury verdicts were logically related to the probative value of the evidence".[54]

17. The Royal Commission noted that a number of the submissions it received perceived limitations in the methodology and findings of the research. These included concerns that the research did not account for the breadth of the concepts of impermissible reasoning and unfair prejudice, doubts that the matters presented to the mock jury covered all the ways in which unfair prejudice may manifest, and disbelief that a mock jury could ever have the negative responses to a fictional accused that may be expected in a real trial.[55]

18. Despite these concerns, the Royal Commission was satisfied that the research methodology was strong "in terms of the size, selection and composition of its mock juries, and the presentation of its mock trials", and that the findings had substantial "validity in terms of informing a consideration of issues in relation to the admissibility of tendency and coincidence".[56]These findings informed the Royal Commission's conclusion[57] that evidence in child sexual offence proceedings was generally more relevant, and less prejudicial, than the law currently assumes.[58]

Appendix 2 – Current test for admissibility of tendency and coincidence evidence

Uniform Evidence Law

1. The admissibility of evidence in proceedings in UEL jurisdictions is governed by legislation based on the Model Uniform Evidence Bill endorsed by the then Standing Committee of Attorneys-General in 2007.

2. Under the UEL, tendency and coincidence evidence is admissible in any proceedings if it has significant probative value.

3. In criminal proceedings, tendency and coincidence evidence about the defendant is admissible if:

    - the evidence has significant probative value, and
    - the probative value of the evidence substantially outweighs any prejudicial effect it might have on the defendant.

4. For example, in NSW, Part 3.6 of the *Evidence Act 1995* (NSW) governs the admissibility of tendency and coincidence evidence.

5. Section 97 of the *Evidence Act 1995* establishes the tendency rule, which provides that tendency evidence is not admissible unless reasonable notice is given and "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value". Section 101 provides that tendency evidence about a defendant cannot be used against the defendant "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant".

6. The coincidence rule under section 98 of the Act provides that coincidence evidence is not admissible unless reasonable notice is given and "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value". Section 101 also applies to coincidence evidence, such that its probative value must substantially outweigh the risk of prejudice for it to be admissible.

7. Under the *Evidence Act 1995*, the assessment of the admissibility of tendency and coincidence evidence takes the probative value of evidence at its highest. That is, the probative value of the evidence is assessed assuming the evidence will be accepted as true, and any questions as to reliability or credibility relating to the evidence do not factor into the assessment. Instead, they become a matter for the trier of fact to resolve if the evidence is adduced. This abrogates the position at common law, where the judge is required to consider reliability and credibility in assessing the probative value of evidence to determine whether it should be admitted.

8. However, some case law has suggested that in certain circumstances a judge may be required to consider the reliability and credibility of the evidence when assessing its probative value. For example, if the possibility of collusion, concoction or contamination is so significant that it undermines the capacity of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding, the judge might consider this possibility in determining admissibility of the evidence, rather than leaving it to the jury to determine.[59]

9. Although Victoria has enacted the Uniform Evidence Law, case law in the jurisdiction has developed in a different direction to NSW. The key differences are:

    - In Victoria, common or similar features or an underlying unity or pattern in the sexual offending is required (rather than merely beneficial) to establish significant probative value.
    - The circumstances that would be considered similar features are narrower in Victoria than in NSW.

- Historically, Victoria also maintained the common law position that the reliability of and weight a jury might give to evidence affects the probative value of the evidence, but this was overruled in *IMM* in 2016.[60]

10. These discrepancies may be reduced by the recent High Court decision in *Hughes*, which held that Victoria had an "unduly restrictive approach to the admission of tendency evidence" and accepted the NSW approach.[61]

11. Further, Victoria has a legislative presumption in favour of joint trials, which is not rebutted merely because the evidence on one charge is inadmissible on another charge.[62] However, the Victorian Government told the Royal Commission that in practice charges are still often severed into separate trials where evidence is not cross-admissible between complainants due to the perceived risk of unfair prejudice to the accused.[63]

Other Australian jurisdictions

South Australia

12. The test for admissibility of tendency and coincidence in South Australia is similar to the test under the UEL. In South Australia, section 34P of the *Evidence Act 1929* (SA) provides that evidence of a defendant's discreditable conduct may be admitted if reasonable notice is given and its probative value substantially outweighs any prejudicial effect it may have on the defendant. If the evidence is used for propensity reasoning, it also must have a 'strong probative value' having regard to the particular issues arising at trial.

13. The *Evidence Act 1929* (SA) also overrides the common law such that the probative value of the evidence is assessed at its highest and any possibility of collusion, concoction or contamination is left to the jury to consider.

Queensland

14. In Queensland, a modified version of the common law test outlined by the High Court in *Pfennig* applies. Under that test, propensity and similar fact evidence may be admitted if it possesses "a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged".[64]

15. This test sets a much higher bar for admissibility than the UEL as, for the evidence to be admissible, there must be no rational interpretation of the evidence available that is consistent with the accused being innocent of the offence charged. Unless there is a 'striking similarity' between the evidence and the defendant's alleged conduct and no possibility of collusion, concoction or contamination, the evidence is unlikely to meet the required threshold.

16. However, section 132A of the *Evidence Act 1977* (Qld) prohibits the court taking the possibility of collusion or contamination into account in relation to similar fact (coincidence) evidence.

Western Australia

17. In Western Australia, section 31A of the *Evidence Act 1906* (WA) provides that propensity evidence is admissible if the court considers that it would have significant probative value and "that the probative value of the evidence compared with 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". When considering the probative value of the evidence, 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".[65]

18. The Royal Commission formed the view that the Western Australian legislation provided for "probably the most liberal test for admitting tendency and coincidence evidence in Australia, particularly taking into account how it is applied by the Western Australian courts".[66]

Extracted legislation

Jurisdiction	Test for admissibility of tendency and coincidence evidence
UEL jurisdictions (e.g. *Evidence Act 1995* (NSW))	**Section 97 The tendency rule** (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless: (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and (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. (2) Subsection (1) (a) does not apply if: (a) the evidence is adduced in accordance with any directions made by the court under section 100, or (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party. **Section 98 The coincidence rule** (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless: (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value. *Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.* (2) Subsection (1) (a) does not apply if: (a) the evidence is adduced in accordance with any directions made by the court under section 100, or (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party. **Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution** (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98. (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant. (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.
South Australia (*Evidence Act 1929*)	**Section 34P—Evidence of discreditable conduct** (1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (discreditable conduct evidence)— (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and

	(b) is inadmissible for that purpose (impermissible use); and (c) subject to subsection (2), is inadmissible for any other purpose. (2) Discreditable conduct evidence may be admitted for a use (the permissible use) other than the impermissible use if, and only if— (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial. (3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose. (4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court. (5) The court may, if it thinks fit, dispense with the requirement in subsection (4) **Section 34Q—Use of evidence for other purposes** Evidence that under this Division is not admissible for 1 use must not be used in that way even if it is relevant and admissible for another use. **Section 34R—Trial directions** (1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used. (2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly. **Section 34S—Certain matters excluded from consideration of admissibility** Evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following: (a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; (b) the evidence may be the result of collusion or concoction.
Western Australia (*Evidence Act 1906*)	31A. Propensity and relationship evidence (1) In this section — *propensity evidence* means — (a) similar fact evidence or other evidence of the conduct of the accused person; or (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had; *relationship evidence* means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time. (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers — (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial. (3) In considering the probative value of evidence for the purposes of subsection (2) it

	is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.
Queensland (common law, partially abrogated by the *Evidence Act 1977*)	The leading authority on the common law test for the admissibility of propensity and similar fact evidence is *Pfennig v The Queen* (1995) 182 CLR 461. In *Pfennig*, Mason CJ, Deane and Dawson JJ set out the test for the admissibility of similar fact evidence: > [The] basis for the admission of similar fact evidence lies in its possessing a particular probative value of cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged. In the earlier case of *Hoch v The Queen* (1988) 165 CLR 292, the High Court considered the admissibility of similar fact evidence in circumstances where the occurrence of the similar acts was in dispute and there was evidence of concoction. The Court held that if there is a possibility (not a probability or a real chance) of concoction the evidence is rendered inadmissible. The principle in *Hoch* has been abrogated in Queensland by legislation: **Section 132A Admissibility of similar fact evidence** In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

Appendix 3 – The Royal Commission

1. On 14 August 2017, the Royal Commission released its Criminal Justice Report (**the Report**), which included extensive consideration of the admissibility of tendency and coincidence evidence. The Royal Commission found that the operation of existing evidence law excludes relevant tendency and coincidence evidence in child sexual offence proceedings, resulting in "unjust outcomes in the form of unwarranted acquittals".[67]

2. The Report made eight recommendations in relation to tendency and coincidence evidence (Recommendation 44-51), including specific recommendations about the test for admissibility and a model Bill.

Summary of the recommendations of the Royal Commission

3. The Royal Commission recommended reforming evidence law to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual offence proceedings[68] in order to address existing injustice to complainants and the community.

4. The Royal Commission recommended that, in child sexual offence proceedings, tendency or coincidence evidence adduced against the defendant should generally be admissible if the court thinks that the evidence, either by itself or having regard to the other evidence, would be relevant to an important evidentiary issue in the proceeding.[69] This test of relevance would be satisfied if it is "evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding" or "evidence that is relevant to any matter in issue in the proceeding if the matter concerns an act or state of mind of the defendant and is important in the context of the proceeding as a whole".[70] This test would also apply to evidence of the defendant's prior convictions and acts for which the defendant has been charged but not convicted (other than acts for which the defendant has been acquitted).[71]

5. In assessing admissibility, the court would be explicitly required to assume that the evidence is accepted, leaving consideration of any issues of possible collusion, concoction and contamination to the trier of fact.[72] Additionally, the prosecution would not be required to be proved beyond reasonable doubt.[73]

6. The Royal Commission recommended that relevant evidence should only be excluded where, on the application of a defendant to refuse to admit tendency or coincidence evidence, the court determines that "admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant" and "if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk".[74]

7. The Royal Commission suggested that, when evidence was not excluded by the proposed test, it could not be excluded under the general exclusionary provisions in the *Evidence Act 1995*.[75] It recommended that "common law principles or rules that restrict the admission of propensity or similar fact evidence should be explicitly abolished or excluded in relation to the admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution".[76]

8. The Royal Commission recommended that all Australian governments should introduce legislation to enact these reforms.[77] It also provided a model Bill for the recommended reforms for Uniform Evidence Act jurisdictions.

Schedule 1 Model amendments to Uniform Evidence Law

[1] Section 92 Exceptions

Insert after section 92 (2):

(2A) In a child sexual offence proceeding (and without limiting subsection (2)), section 91 (1) does not prevent the admission or use of a defendant's conviction for an offence as tendency evidence or coincidence evidence.

[2] Section 96A

Insert after section 96:

96A Special provisions for defendants in child sexual offence proceedings

(1) For the purposes of this Part, each of the following kinds of evidence is ***relevant to an important evidentiary issue*** in a child sexual offence proceeding:

(a) evidence that shows a propensity of the defendant to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding,

(b) evidence that is relevant to any matter in issue in the proceeding if the matter:

(i) concerns an act or state of mind of the defendant, and

(ii) is important in the context of the proceeding as a whole.

(2) In applying section 97 (1A) (a), 98 (1A) (a) or 100A (1) (a) to evidence about a defendant in a child sexual offence proceeding, the court is to determine whether the test referred to in the provision is satisfied assuming the evidence were to be accepted as credible and reliable.

(3) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding.

(4) Without limiting subsection (3), evidence is not inadmissible as tendency evidence or coincidence evidence about a defendant in a child sexual offence proceeding only because it is about:

(a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, or

(b) an act for which a party has been charged with an offence in Australia or a foreign country, but not convicted (except if it was because of an acquittal before or by an Australian court or a foreign court).

Note. Paragraph (b) includes situations where charges are withdrawn or an offence has been proven and no conviction entered by the court.

(5) Any fact that is relied on as tendency or coincidence evidence about a defendant in a child sexual offence proceeding does not have to be proved beyond a reasonable doubt.

[3] Section 97 The tendency rule

Omit section 97 (1) (b). Insert instead:

(b) the tendency evidence admissibility test for the evidence is satisfied.

[4] Section 97 (1A)

Insert after section 97 (1):

(1A) The ***tendency evidence admissibility test*** for the purposes of subsection (1) (b) is:

(a) for evidence about the defendant in a child sexual offence proceeding—that 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, be relevant to an important evidentiary issue in the proceeding, or

(b) for evidence about any other person—that 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.

[5] Section 98 The coincidence rule

Omit section 98 (1) (b). Insert instead:

(b) the coincidence evidence admissibility test for the evidence is satisfied.

[6] Section 98 (1A)

Insert after section 98 (1):

(1A) The ***coincidence evidence admissibility test*** for the purposes of subsection (1) (b) is:

(a) for evidence about the defendant in a child sexual offence proceeding—that 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, be relevant to an important evidentiary issue in the proceeding, or

(b) for evidence about any other person—that 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.

[7] Section 100A

Insert after section 100:

100A Exclusion of tendency evidence and coincidence evidence in child sexual offence proceeding

(1) Despite sections 97 and 98, the court in a child sexual offence proceeding may, on the application of a defendant, refuse to admit tendency evidence or coincidence evidence about the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that:

(a) admission of the evidence is more likely than not to result in the proceeding being unfair to the defendant, and

(b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence will not remove the risk.

(2) The admission of evidence is not unfair to a defendant in a child sexual offence proceeding merely because it is tendency evidence or coincidence evidence.

Note. See also section 98A (3) and (4).

(3) If directions about the relevance and use of tendency evidence or coincidence evidence will remove the risk of unfairness of the kind referred to subsection

(1) (b), the court must give those directions rather than refuse to admit the evidence.

(4) Tendency evidence or coincidence evidence about a party that is admissible under this Part in a child sexual offence proceeding cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party

[8] Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution non-child sexual offence proceeding

Insert "(other than a child sexual offence proceeding)" after "criminal proceeding" in section 101 (1).

[9] Dictionary

Insert in alphabetical order:

child sexual offence means any of the following offences (however described) regardless of when it occurred:

(a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual assault of, a person under 18 years if that person's age at the time of the offence is an element of the offence,

(b) an offence against, or arising under, a law of this State involving indecent conduct with, or directed towards, a person under 18 years if that person's age at the time of the offence is an element of the offence,

(c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b),

but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

Jurisdictional note. Paragraphs (a) and (b) of this definition are suggested as an alternative to listing specific offences. If they prefer, jurisdictions may choose instead to list specific offences (including historical ones).

child sexual offence proceeding means:

(a) a criminal proceeding for a child sexual offence, or

(b) a criminal proceeding for the murder or manslaughter of a person under 18 years of age if the commission of a child sexual offence by the defendant (whether in relation to that child or another child) is a fact in issue.

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1. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 634
2. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 634
3. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 633
4. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 634
5. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 591
6. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 639-640
7. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 639-640
8. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, pages 639-640
9. Section 101 of the *Criminal Justice Act 2003*.
10. *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73]
11. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 595.
12. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 594.
13. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 640
14. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 640
15. David Hamer cited at Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 640
16. *R v Handy* [2002] 2 SCR 908 [55]. See discussion in David Hamer (2016) *The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in Child Sexual Assault Prosecutions in a Selection of Foreign Jurisdictions*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse.
17. New Zealand law does not establish a distinction between 'propensity' or tendency evidence and coincidence evidence.
18. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 641
19. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 503
20. Section 31A(2)(b) of the *Evidence Act 1906* (WA).
21. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 430
22. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 508
23. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 553
24. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 553
25. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 641
26. *Mol v R* [2017] NSWCCA 76 at [36]; *DAO v R* (2011) 81 NSWLR 568 at [171].
27. *Hoch v The Queen* (1988) 165 CLR 292, 254 (Mason CJ, Wilson and Gaudron JJ)
28. *Tasmania v Y* [2007] TASSC 112, [37] (Crawford J)
29. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 641
30. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 641
31. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 540
32. *DJV v R* [2008] NSWCCA 272
33. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 645
34. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 645
35. Sections 61 and 62 of the *Jury Directions Act 2015* (Vic).
36. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 646

37. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 648
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42. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 411.
43. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 416.
44. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 445.
45. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 414.
46. *Hughes v The Queen* [2017] HCA 20 [2].
47. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 455.
48. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, see, for example, pages 417 and 455.
49. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 458.
50. *IMM v The Queen* [2016] HCA 14, [158]–[161] (Nettle and Gordon JJ); (2016) 257 CLR 300, 345-6.
51. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 457.
52. J Goodman-Delahunty, A Cossins and N Martschuk*, Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study* http://childabuseroyalcommission.gov.au/policy-and-research/events/jury-reasoning-launch
53. J Goodman-Delahunty, A Cossins and N Martschuk, *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, pages 36-37.
54. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 463.
55. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 468-477.
56. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 617.
57. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, page 617.
58. J Goodman-Delahunty, A Cossins and N Martschuk*, Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study,* Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.
59. *GM* [2016] NSWCCA 78.
60. *IMM v The Queen* [2016] HCA 14.
61. *Hughes v The Queen* [2017] HCA 20 [12].
62. *Criminal Procedure Act 2009* (Vic) section 194.
63. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 525.
64. *Pfennig v The Queen* [1995] HCA 7 [58], [61] (Mason CJ, Deane and Dawson JJ); (1995) 182 CLR 461, 481, 483.
65. *Evidence Act 1906* (WA) section 31A(3).
66. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 430.
67. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 629.
68. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 44.
69. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 45.
70. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 650.
71. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 49.
72. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 47.
73. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 48

74. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Parts III-VI, page 650.
75. Section 135 of that Act allows evidence to be excluded where, for example, it is unfairly prejudicial to the accused and section 137 establishes that the court must refuse to admit evidence adduced by the prosecutor in a criminal proceeding if its probative value is outweighed by the danger of unfair prejudice to the defendant.
76. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 46.
77. Royal Commission into Institutional Response to Child Sexual Abuse, *Criminal Justice Report,* August 2017, Recommendation 50.