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Provision (*Evidence Amendment (Tendency and Coincidence) Act 2020* amendments in blue)	Questions	Stakeholder Comments[1]
Part 3.6 Tendency and coincidence	1. Do you have general comments about the operation of Part 3.6 of the *Evidence Act 1995* (**Evidence Act**) in child and/or adult sexual offence proceedings, including the amendments made by the *Evidence Amendment (Tendency and Coincidence) Act 2020* (the **amending Act**)? 2. Is further amendment needed to facilitate the admission of tendency or coincidence evidence in either child and/or adult sexual offence proceedings?	***1. General comments*** In the criminal law context, much of the work done by Part 3.6 relates to the admissibility of evidence of a defendant's other misconduct. A major problem in this area of law has long been its complexity. The common law was described, mid-last century, as being of 'apparently insoluble difficulty',[2] and a couple of decades later, as a 'pitted battlefield'.[3] Part 3.6 of the *Evidence Act* did not improve matters, the Victorian Court of Appeal describing it as 'exceedingly complex and extraordinarily difficult to apply'.[4] The Royal Commission noted that 'the law in this area has become unnecessarily complicated'.[5] Unfortunately, the amending Act makes matters even worse. Prior to the reforms, Part 3.6 split other misconduct evidence into two categories, tendency and coincidence evidence, and subjects each to two overlapping admissibility tests, each turning on the probative value of the evidence. While the tests are expressed identically for tendency and coincidence evidence, case law suggests that they are more demanding for coincidence evidence (as discussed below in relation to s 98(1A)). According to a further principle receiving growing case-law, the tests are less demanding where commission is in issue rather than, for example, identity (discussed below in relation to s 97A). The latest reforms do nothing to address the complexity. On the contrary, they worsen the situation. The reforms retain the double admissibility test and reinforce the questionable distinction between tendency and coincidence evidence. On top of this they give legislative force to the distinction between commission and identity cases, and introduce yet more (on my count, fourth and fifth) bifurcations – between child sexual offence (CSO) cases and non-CSO

1 This submission draws heavily on my published research, in particular 'Myths, misconceptions and mixed messages: An early look at the new tendency and coincidence evidence provisions' (2021) 45 *Crim LJ* 232. For the sake of ease of reading I have not used quotation marks around every part that is taken from that article.
2 Z Cowen and PB Carter, 'The admissibility of evidence of similar facts: A re-examination', in *Essays on the Law of Evidence* (1956, Oxford: Clarendon Press) 106. See further David Hamer, 'The Legal Structure of Propensity Evidence' (2016) 20 *The International Journal of Evidence & Proof* 136, 136-7.
3 *DPP v Boardman* [1975] AC 421, 445.
4 *Velkoski v The Queen* (2014) 45 VR 680 [33].
5 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Commonwealth of Australia, 2017) Parts III–VI, 591.

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		cases, and between (tendency) evidence of the defendant's sexual interest in a child and other (tendency) evidence. This raises the question of why the complexities – which, for the most part, are unnecessary and harmful – appear to proliferate despite the repeated case-law and legislative reforms? The answer may have been provided by Robert Torrens more than a century and a half ago: > The work of law reform has been left in the hands of lawyers … As Lord Brougham says — 'They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century.' … It would seem as though the mind, confined for a length of time to run in grooves, loses the power to draw out from the deep-worn track. Hence, upon examining the projects of law reform emanating from legal men, even the most learned, we find them to be little better than palliatives.[6] ***2. Extending the reforms beyond child sexual offences*** An argument can be made that the reform process should be recommenced with the goal of addressing the complexity problem as well as the goal of facilitating the admission of other misconduct evidence. It is still quite early days for the reforms. While, at the Council of Attorneys General in November 2019, all uniform evidence law (UEL) jurisdictions said they would implement these reforms, so far, only ACT and NT have joined NSW. Victoria, Tasmania and the Commonwealth have not. This may (or may not) reflect some hesitancy about the reforms. The Victorian Attorney General recently said Victoria was waiting for the outcome of this NSW review.[7] Only a handful of first instance decisions relating to the provisions are readily available. The reforms appear to be achieving the goal of making other misconduct evidence more readily admissible, but only in an extremely narrowly confined set of circumstances – s 97A, the key

6 Robert R Torrens, The South Australian System of Conveyancing by Registration of Title (Register and Observer General Printing Offices, Adelaide, 1859) pp 5–6.
7 Victoria, *Parliamentary Debates*, Legislative Council, 8 March 2022, 585 (Jaclyn Symes, Attorney General).

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		reform, is limited to tendency evidence of sexual interest in a child in a CSO case, arguably only where commission is in issue. Most criminal prosecutions are unable to take advantage of the reforms. The narrowness of the reforms is a particular problem in adult sexual offence (ASO) cases which pose many of the same difficulties for the prosecution as CSO casrs. Like child sexual assault, sexual offences against women occurs with a very high incidence, however perpetrators often go unpunished. As in CSO cases, ASO cases are often word-against-word, making it difficult for the prosecution to establish its case to the criminal standard of proof. As in CSO cases, one useful source of evidence for the prosecution would be evidence of the defendant's other similar misconduct against other victims. As in CSO cases, this evidence is subject to exclusion by the tendency and coincidence rules of Part 3.6. As in CSO cases, it can be argued that the stringency of the exclusion is unjustified. This evidence is both more probative and less prejudicial than traditional jurisprudence suggests. The admissibility tests should be relaxed for ASO cases as they have been for CSO cases. As Lord Hope said 'the balance between the rights of the defendant and those of the complainant is in need of adjustment if women are to be given the protection under the law to which they are entitled against conduct which the law says is criminal conduct'.[8] A further more specific problem arises in relation to the admissibility of tendency evidence in ASO cases which should also be addressed by legislation. This is the principle, propounded by the High Court (HCA) in *Phillips*,[9] that where consent is in issue, evidence of other alleged victims that they also did not consent to sexual contact with the defendant, is not only insufficiently probative to be admissible (for example, under Part 3.6); it is wholly irrelevant (and so inadmissible, for example, under Part 3.1). According to the High Court, other alleged victims' evidence 'proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her'.[10] This ignores the obvious point that the if the alleged victims did have non-consensual sex with the defendant, this says a great deal

8 *R v A* [2002] 1 AC 45, 71.
9 (2006) 225 CLR 303.
10 Ibid [47].

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		about the defendant's pattern of sexually predatory behaviour. While some courts have found a way around the *Phillips* principle,[11] in others it has contributed to the exclusion of other misconduct evidence and the non-enforcement of sexual assault laws.[12] The *Phillips* decision, described by Heydon J as 'one of the most criticised decisions of the High Court of all time',[13] requires correction.
94 Application … (4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant. (5) In determining the probative value of tendency evidence or coincidence evidence for the purposes of section	1. Are there any issues in with the interpretation of these provisions in child and/or adult sexual offence proceedings? 2. Please provide any other comments you have about subsections 94(4)-(5) of the Evidence Act.	***Limiting the influence of the restrictive common law*** S 94(4) is not a key provision of the reforms. Instead it is seeks to support the central reforms (s 97A in particular, but also s 101) by addressing the risk that courts will be influenced by the stringent common law approach of *Phillips* and adopt a restrictive interpretation defeating the legislation's goals. (As well as the relevance point discussed above, the High Court in *Phillips* also took a very stringent line in assessing the probative value of evidence of the defendant's other misconduct.) There is scope for courts to be influenced by the common law because the admissibility tests present the courts with an "open-textured, evaluative task".[14] In relation to broadly similar English reforms (introduced by the *Criminal Justice Act 2003* (UK)) which greatly opened up admissibility of other misconduct evidence, Paul Roberts and Adrian Zuckerman suggested that "deep-seated attitudes are not going to be changed simply by reversing the polarity of judicial supervision, replacing presumptive exclusion … with a statutory rule of presumptive admissibility".[15] But the practice of English courts did change considerably. Judges recognised that the reform "completely reverses the pre-existing general rule".[16] They implemented the legislative intention "that evidence of bad character would be put before juries more frequently

11 Eg *Little* [2018] QCA 113 [24].
12 *Jacobs* [2017] VSCA 309 [34]-[35]; *R v Collins* [2013] QCA 389 [38], [50].
13 *Stubley v The State of Western Australia* [2010] HCATrans 269 (20 October 2010), see eg David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609; Jeremy Gans, 'Similar Facts after *Phillips*' (2006) 30 Criminal Law Journal 224, 237.
14 *Hughes v The Queen* (2017) 263 CLR 338, [42].
15 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (OUP, 2nd ed, 2010) 586.
16 *R v Manister* [2006] 1 Cr App R 19, [35].

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97(1)(b), 97A(4), 98(1)(b) or 101(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 contamination.		than in the past".[17] They respected the British Government's intention that greater "trust" should be put in juries "to use their judgment".[18] The NSW Attorney General indicated in the second reading speech that the legislation "should be considered in light of the objective … to facilitate greater admissibility of tendency evidence".[19] Courts are taking heed of this message. In *R v Brookman,* District Court Judge Abadee quoted from the second-reading speech and rejected defence submissions that, his Honour said, "would effectively seek to restore the position as it was prior to the 2020 amendments", indicating that this "would not … be a legitimate exercise in judicial power".[20] However, while the reforms appear to be serving the goal of facilitating the prosecutions in CSO cases, it is less clear what effect s 94(4) will have on the many criminal cases that lie beyond the scope of the key s 97A reform. In the HCA decision of *Hughes*,[21] a CSO case, Nettle J adopted a restrictive approach to admissibility on the basis that, while the *UEL* changed the admissibility test, 'the process of reasoning … is, logically and necessarily, the same process of probability reasoning that was applied at common law.'[22] None of the various interpretations of the *UEL* in the ensuing case law 'altered the logic of the probability reasoning which is the *raison d'être* of tendency evidence.'[23] Nettle J concluded that a restrictive approach would remain appropriate unless and until 'Parliament … enact[s] legislation that treats disparate sexual offences committed in different circumstances at different times in different places against different children as significantly probative of the commission of each other'.[24] Of course, the reforms do just this, but they primarily target a narrow class of evidence in CSO cases.

17 *R v Edwards* [2006] 2 Cr App R 4, [1]; see also Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press, 2015), 145; John R Spencer, *Evidence of Bad Character* (Hart Publishing, 3rd ed, 2016) 19.
18 Hilary Benn, *Standing Committee B*, House of Commons, Session 2002-03, 23 January 2003, Col 548.
19 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1915 (Mark Speakman, Attorney General), quoted in *R v Brookman* [2021] NSWDC 110, [23].
20 [2021] NSWDC 110 [57].
21 (2017) 263 CLR 338.
22 Ibid [174].
23 Ibid [175].
24 Ibid [203].

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		Nettle J was dissenting in *Hughes*. The majority were critical of 'unduly restrictive'[25] approaches to admissibility. However, the majority still highlighted special features common to the other misconduct and the charged offence – in each case the defendant had acted opportunistically and risked detection.[26] In subsequent CSO cases, *Bauer*[27] and *McPhillamy*,[28] the High Court seems to have shifted further in the direction of greater stringency. In *Bauer*, a prosecution appeal from the VCA, the High Court spoke of the need for a "special, particular or unusual feature",[29] "some feature of or about the offending which links the two together".[30] Without this, "evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant".[31] In *McPhillamy*, the High Court preferred Meagher JA's dissenting judgment in the NSWCCA. Meagher JA would have excluded the evidence due to the "generality of the tendency"[32] and the "absence of sufficient similarity".[33] The High Court said there was a need for "some feature of the other sexual misconduct and the alleged offending which serves to link the two together"[34] and emphasised that there was "no evidence that the asserted tendency had manifested itself in the [intervening] decade" between the other misconduct and the charged offence.[35] It was not enough that the defendant held a similar supervisory position over all the alleged victims, that they were all boys, close in age, and that they all alleged broadly similar

25 Ibid [12].
26 Ibid [57]–[59].
27 (2018) 266 CLR 56.
28 (2018) 92 ALJR 1045.
29 *R v Bauer* (2018) 266 CLR 56, [48].
30 Ibid [58].
31 Ibid.
32 *McPhillamy* above [18].
33 Ibid [24].
34 Ibid [31].
35 Ibid [27].

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		sexual misconduct.[36] The Court noted differences between the circumstances of the other misconduct and the charged offence[37] – the other alleged victims, homesick and vulnerable, had sought the defendant's support and the offending took place in the privacy of the defendant's bedroom; the defendant was alleged to have followed the complainant into a public toilet and molested him there. In view of these differences, the evidence "rose no higher in effect than to insinuate that [the defendant] was the kind of person who was more likely to have committed the offences".[38] It seems certain that *McPhillamy* would be decided differently had s 97A had application. However, notwithstanding s 94(4), the far more restrictive approach appears likely to continue in relation to cases not covered by s 97A. For example in *IW*, it was noted that the effect of s 97A is that the restrictions from *Bauer* don't apply.[39] In *Taylor*, a domestic violence case, the majority ultimately upheld admissibility, but were careful to distinguish *McPhillamy*,[40] while Bell J, in a carefully reasoned dissent, considered the evidence of the defendant's domestic violence against a previous partner inadmissible.[41] ***Collusion, concoction and contamination*** The evident intent of s 94(5) is to make it clear that the common law approach to other allegation evidence, laid down in *Hoch,*[42] is not applicable under the *Evidence Act*. *Hoch* is authority that, at common law, prosecution evidence of other sexual assault allegations against the defendant from a variety of witnesses will be inadmissible 'where there is a possibility of joint concoction'.[43] S 94(5) overrides *Hoch*.

36 Ibid [4], [6], [7].
37 Ibid [31].
38 Ibid [32].
39 [2021] NSWDC 789 [34].
40 *Taylor* [2020] NSWCCA 355 [148].
41 Ibid [125].
42 (1988) 165 CLR 292.
43 Ibid 296 (emphasis added).

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		S 94(5) is broadly consistent with recent High Court authority, *IMM*[44] and *Bauer*.[45] However, it leaves a couple of uncertainties. First, the principle laid down in those cases was stated more broadly in terms of 'taking the evidence at its highest … [T]he determination of probative value [by the trial judge at the admissibility stage] excludes consideration of credibility and reliability'.[46] The reforms refer only to 'collusion, concoction [and] contamination' which does not cover all credibility issues. For example, a witness's credibility may be questioned because of their demeanour or inconsistencies in their accounts without any suggestion of collusion, concoction or contamination. It could be argued that s 94(5) narrows the principle from *IMM* and *Bauer*, although this would likely be rejected as contrary to the purpose of the reform. A second question is whether s 94(5) leaves room for a qualification to the HCA's 'taking evidence at its highest' principle. In *Bauer* it was held that a trial judge may exclude evidence where 'the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence'.[47] In *IMM* the majority suggested: 'There may of course be a limiting case in which the evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. In such a case its effect on the probability of the existence of a fact in issue would be nil and it would not meet the criterion of relevance.'[48] These statements are puzzling but fortunately they have limited application.
97A Admissibility of tendency evidence in proceedings involving child sexual offences	1. Are there any issues in with the interpretation of section 97A of the Evidence Act in child	At the centre of the reforms is the rebuttable presumption of significant probative value in s 97A. This presumption may greatly assist the prosecution in gaining admission for valuable evidence. However, the presumption is remarkably complex. First, it has a tightly restricted sphere of operation. The restrictions operate by reference to the type of proceedings (child sex

44 (2016) 257 CLR 300 [49]-[54] (French CJ, Kiefel, Bell and Keane JJ).
45 (2018) 266 CLR 56 [69]
46 *Bauer* (2018) 266 CLR 56, [69]
47 Ibid. See also *IMM* above [39].
48 At [39]; see also at [59].

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(1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue. (2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2)— (a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest), (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.	sexual offence proceedings? 2. Is there is a need for a provision similar to section 97A to apply to particular tendencies in adult sexual offence proceedings? 3. Please provide any other comments you have about section 97A.	offence proceedings), the type of evidence (tendency evidence – not coincidence evidence – of a defendant's sexual interest in children), and it appears likely that the restrictions are also limited to cases where commission of an act is in issue (rather than identity, medical justification, or accident). Each of these numerous restrictions may raise issues. And then, even if it is determined that the presumption does apply, further complexities may present themselves. The presumption is rebuttable, but, as outlined below, determining whether it has been rebutted is a multistage operation. The presumption is seriously overengineered. ***Scope of the presumption*** It is worth noting, first, that the presumption is limited to criminal proceedings. The prosecution may rely upon the presumption in criminal proceedings for child sexual assault, but alleged victims in related civil proceedings may not.[49] The expression 'child sexual offence' presents issues of interpretation.[50] 'Child' is defined straightforwardly to mean a person under 18 years.[51] However, in other respects, the expression has unclear scope. It extends beyond offences involving 'sexual intercourse' with a child, to offences involving 'an unlawful sexual act with, or directed towards … a child'.[52] This may not include possession of child pornography, particularly where the material, text or images, is not based on real children.[53] Also apparently lying beyond the scope of the section are grooming offences involving 'apparently innocuous conduct'[54] rather than overtly sexual acts; with grooming offences 'the critical feature is not the conduct itself, but the intention that accompanies it'.[55] The extension to grooming offences will be even more doubtful where 'the

49 The defence, facing an action in defamation for having labelled the plaintiff a paedophile, will also be unable to rely upon the presumption in invoking truth as a defence.
50 Note also 'child sexual offence' is defined to include conduct that occurred beyond the legislating jurisdiction but would have constituted a 'child sexual offence' had it been committed in the jurisdiction: s 97A(6)(c).
51 UEL (2020) s 97A(6).
52 Ibid s 97A(6)(a) and (b).
53 Hadeel Al-Alosi, 'Criminalising Fictional Child Abuse Material: Where Do We Draw the Line?' 41 *Criminal Law Journal* 183.
54 Victoria, Legislative Assembly, *Debates*, 12 December 2013, p 4668 (R Clark, Attorney-General), quoted in Royal Commission, Parts III-VI (n 2) 83.
55 Ibid.

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(3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally. (4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so. (5) The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account—		"child" does not exist and charges were laid following a police 'sting'".[56] It has been held that the ACT provision does not extend to proceedings for the prosecution of an offence under 233BAB(5) of the *Customs Act 1901* (Cth), intentionally importing a doll resembling a person under 18 years of age intended to be used by a person to simulate sexual intercourse.[57] In CSO proceedings, the presumption only applies to tendency evidence of a defendant's sexual interest in children. It does not apply to coincidence evidence of a defendant's sexual interest in children, even though identical evidence may be open to either characterisation and notwithstanding the significant overlap between the two categories and the two rules governing them. This point is discussed further in the next section relating to the new s 98(1A). Determining whether evidence of a defendant's conduct can be considered evidence of the defendant's sexual interest in children may also raise challenges. In the NT case of *RCA*[58] an issue arose as to whether the defendant's behaviour with children towards whom he had a parental role 'may be seen, largely, as non-sexualised conduct in which a father might have engaged with daughters of that age'.[59] The conduct included kissing, blowing raspberries on their stomachs, and spanking them on their bare bottoms. Taking a contextual approach, considering this evidence along with evidence of other sexualised behaviour towards, it was held this evidence was covered by the presumption.[60] This reasoning may invite the charge of circularity, but this logical hazard is not confined to the current reforms.[61] The discussion above deals with certain restrictions on the presumption's scope that definitely exist, even while their precise delineation remains indefinite. The presumption only operates on *tendency evidence* about the defendant's *sexual interest in children* adduced in *child sex offence proceedings*. It does not apply to coincidence evidence, nor evidence showing other tendencies, nor other kinds of proceedings. The existence of a further restriction is less clear. It

56 Royal Commission, *Criminal Justice Report*, Parts III-VI, 79.
57 *Deacon* [2021] ACTSC 292 [86].
58 [2022] NTSC 6.
59 Ibid [49].
60 Ibid [51].
61 *Perry* (1982) 150 CLR 580, 589-590 (Gibbs CJ), 594-5 (Murphy J), 607 (Wilson J), 612 (Brennan J); *Sutton* (1984) 152 CLR 528,532- 3 (Gibbs CJ), 550-2 (Brennan J), 560-1 (Deane J); 567-8 (Dawson J).

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(a) the sexual interest or act to which the tendency evidence relates (the tendency sexual interest or act) is different from the sexual interest or act alleged in the proceeding (the alleged sexual interest or act), (b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred, (c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the		appears that the presumption only operates in proceedings where *commission* is in issue, rather than, for example, identity or intent. The existence of this restriction hinges on s 97A(1), which provides "[t]his section applies in a criminal proceeding in which the *commission by the defendant of an act* that constitutes, or may constitute, a child sexual offence is a fact in issue".[62] This is open to different interpretations. If emphasis is placed on the words "commission … of an act" (but not "by the defendant"), the presumption would be limited to cases where the defendant has been clearly identified by the alleged victim but denies the allegation. Many sexual offence cases involve allegations against people known to the complainant and are of this kind. However, a second interpretation is open. If emphasis is instead placed on the words "by the defendant", then the presumption would extend to identity cases. The first interpretation, restricting the section to commission cases, is supported by reference to the background to the reforms.[63] It would pick up on a proposition which recently received the support of the majority and Gageler J in *Hughes*. The joint judgment indicated that "[t]he probative value of tendency evidence will vary depending upon the issue that it is adduced to prove".[64] More would be required of evidence adduced "to prove the *identity* of the offender for a known offence [than] where the fact in issue is the *occurrence* of the offence".[65] Subsequently, the Royal Commission endorsed this distinction between identity cases and commission cases: 'Where the tendency or coincidence evidence is not required to establish the identity of the accused – typically because the complainants have each named the accused as their abuser – it is not clear why any particular level of similarity between incidents of proven or alleged child sexual abuse is required.'[66] The Royal Commission's recommended

62 Emphasis added.
63 Arguably s 97A is ambiguous in this respect. However, ambiguity is not required for a broad reference to context. "The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which … one may discern the statute was intended to remedy": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow J).
64 (2017) 263 CLR 338, [39].
65 Ibid [65]; see also at [95] (Gageler J).
66 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 595.

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alleged sexual interest or act, (d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act, (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act, (f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,		relaxation of the exclusionary rule was limited to commission cases.[67] This passage from the Royal Commission's report was quoted in the NSW Attorney General's second reading speech.[68] The intention of the reforms appears to be to implement the Royal Commission's recommendation in this respect, confining the presumption's operation to cases where commission is in issue, and not identity. The proposition that tendency evidence is inherently more valuable in commission cases than in identity cases lacks a solid basis. It appears to rest on the notion (discussed further below in relation to the presumption's rebuttal) that probative value is to be assessed contextually. The majority in *Hughes* suggested that the admissibility test does not apply to "the disputed evidence … *by itself* [but to] the disputed evidence together with other evidence".[69] The Royal Commission indicated that "the value of the tendency or coincidence evidence must be determined in light of the other prosecution evidence".[70] In the typical commission sex offence case, the other evidence includes the complainant's direct evidence of the offence which may provide extremely strong support – if accepted, it proves all the elements of the offence. The tendency evidence goes to the narrow issue of whether the "the complainant's account … has been fabricated".[71] Given this evidence, there is less work for the tendency evidence to do. Contextually, the tendency evidence can achieve more. On this reasoning, the true operative distinction is not between identity and commission cases, but between cases where the propensity evidence operates alone and those where it operates

67 Evidence (Tendency and Coincidence) Model Provisions cl 96A(1)(a): Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts VII–X, Appendix N, 594.
68 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1913 (Mark Speakman, Attorney General).
69 *Hughes v The Queen* (2017) 263 CLR 338, [40].
70 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III-VI, 606.
71 *Hughes v The Queen* (2017) 263 CLR 338, [40]; see also at [60] (Kiefel CJ, Bell, Keane and Edelman JJ), [95] (Gageler J).

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(g) the level of generality of the tendency to which the tendency evidence relates. (6) In this section— ***child*** means a person under 18 years of age. ***child sexual offence*** means each of the following offences (however described and regardless of when it occurred)— (a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence, or (b) an offence against, or arising under, a law of this State involving an unlawful sexual act with, or directed towards, a		in conjunction with, and derives support from, other evidence.[72] "[T]here is no special rule for identification cases."[73] There is no sound reason to allow tendency evidence in more readily in commission cases than identity cases. The line between the two may be negligible. Consider two almost identical cases. In both the complainant, a young child, testifies that the defendant, her stepfather, sexually assaulted her. In the first case the defendant denies that it happened at all. In the second, the defendant admits that the sexual assault happened but suggests that the child is confused, and it was actually her natural father that committed the sexual assault.[74] In both cases, the prosecution seeks to adduce tendency evidence that the defendant has prior convictions for child sexual assault. Why should the tendency evidence gain admission more readily in the first case than in the second case? Consider another CSO case where the prosecution has medical evidence of the assault, but the child is too young to identify his abuser. The prosecution relies upon powerful opportunity evidence that only two people, the child's parents, had the opportunity to commit the assault. There is also evidence one of the parents, the defendant, has prior convictions for child sexual abuse. Although going to identity, the tendency evidence in this case may be considered particularly valuable and gain ready admission due to the limited number of potential perpetrators – the strong contextual opportunity evidence.[75] Confining s 97A to commission cases to the exclusion of identity cases lacks a sound rationale. The drafting of this part of the section presents a further related difficulty. Section 97A(1) limits the presumption to cases "in which the commission by the defendant *of an act* that constitutes, or may constitute, a child sexual offence is a fact in issue".[76] It seems that the presumption would not apply where, for example, the defendant admitted that he had touched the child as

72 *R v John W* [1998] 2 Cr App R 289, 300; English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001) [2.23], [4.6]; see also Roderick Munday, "Similar Fact Evidence: Identity Cases and Striking Similarity" (1999) 58 *Cambridge Law Journal* 45, 46; David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 29 *Monash University Law Review* 137, 184–185.
73 English Law Commission, above, [2.23], [4.6].
74 For example *HG v The Queen* (1999) 197 CLR 414;[1999] HCA 2.
75 *TL v The Queen* [2020] NSWCCA 265, [224]; *O'Leary v The King* (1946) 73 CLR 566 (Williams J); see further discussion in Hamer, "Structure and Strength", above, 184–185.
76 Emphasis added.

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person who was a child at the time of the offence, or (c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b), but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.		the child alleged, but claimed that it was accidental or was justified for a medical purpose.[77] As with the exclusion of identity cases, it is not clear why the prosecution should be denied the benefit of the presumption where accident or justification is in issue.[78] ***Rebutting the presumption*** Having determined that the tendered evidence is subject to the presumption of significant probative value, the next question is whether the presumption is rebutted. At this point the drafting becomes rather convoluted. A trial judge will only be permitted to find that the evidence lacks significant probative value if 'satisfied there are sufficient grounds to do so'.[79] Under s 97A(5), unless there are 'exceptional circumstances', certain matters '(whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds'.[80] It has been suggested the process to be followed in determining whether the presumption has been rebutted involves no fewer than eight steps.[81] Despite all of this technicality, the operation determining whether the presumption has been rebutted also calls for trial judge discretion. The key considerations of 'sufficient grounds' and 'exceptional circumstances' are not defined.[82] The decisions available so far suggest trial judges will not be quick to find circumstances are exceptional. In *Brookman* the trial judge rejected defence submissions to that effect, noting that the Attorney General in the second reading speech said that the term sets a 'high bar'.[83] The list of matters that are "not to be taken into account" is exclusive, immediately raising the question whether any potential factors are missing from the list. The list appears quite comprehensive, but there are several that do not appear. The list does not include the age of

77 For example *Hughes v The Queen* (2017) 263 CLR 338, [40], [107]; 264 A Crim R 225; [2017] HCA 20; *Velkoski v The Queen* (2014) 45 VR 680, [178]; 242 A Crim R 222; [2014] VSCA 121.
78 In this respect, the majority in *Hughes* treated cases where the issue is whether the defendant's "anodyne conduct has been misinterpreted" in the same way as commission cases: *Hughes v The Queen* (2017) 263 CLR 338, [40].
79 s 97A(4).
80 s 97A(5).
81 *RCA* above [34] citing S Odgers, *Uniform Evidence Law* (LawBook, 16th ed, 2021) 772-773, [EA.97A.150].
82 See *RCA* above [32]-[33].
83 *Brookman* above [57].

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		the defendant. "Since offending declines with age, one should be wary of thinking that a few convictions gained by age 19 says much about a person at age 24 if they have not offended since."[84] Nor does it mention the intervention of some significant event between the other misconduct and the charged offence, such as the defendant's attendance at a rehabilitation program.[85] These considerations would not necessarily be covered by the reference in s 97A(5)(e) to the "period of time" between the other misconduct and the charged offence. The list also does not include the number of other incidents. The trial judge may find that the other misconduct evidence lacks significant probative value because it was an isolated event.[86] These omissions seem more likely the result of oversight than calculation. These missing matters have the same basic nature as the matters that do appear in s 97A(5). ***Extending the reforms beyond CSOs*** For a number of reasons, the relaxation of the exclusionary rule should be extended beyond CSOs. Arguably, the relaxation should extend beyond CSOs and ASOs to criminal offences generally. Further, consideration should be given to achieving this through a mechanism that is simpler and more logical than s 97A. And it would also make sense to consider the operation of the exclusionary rules in civil cases. At a minimum, a provision corresponding with s 97A should be introduced for ASOs. Such a move is justified both by policy considerations, and by reference to the Royal Commission's analysis of the logic of proof. The policy considerations were mentioned above in my opening comments in the first section. ASOs present the same law enforcement challenges as CSOs. An extension of the reforms is justified by the reasoning of the Royal Commission which was adopted by the Government in introducing the CSO reforms. In the second reading speech the Attorney General said that the reason that trial judges would generally be prevented from

84 Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press, 2015), 27, though he also notes "the hazard rate for sexual reoffending declines slowly compared to theft".
85 See, eg, Friedrich Lösel and Martin Schmucker, "The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis" (2005) 1 *Journal of Experimental Criminology* 117.
86 See, eg, *Bauer v The Queen (No 2)* [2017] VSCA 176, [82]; *R v Bauer* (2018) 266 CLR 56, [97]. But "a single previous incident can form the basis of tendency evidence": *TL v The Queen* [2020] NSWCCA 265, [224] quoting from *Aravena v The Queen* (2015) 91 NSWLR 258 [86].

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		taking into account the matters in s 97A(5) in determining whether tendency evidence has significant probative value is that 'they are the sorts of myths and misconceptions that have historically prevented evidence about a defendant's tendency to have a sexual interest in a specific child, or in children generally, or a tendency to act upon such an interest, from being seen to have significant probative value'.[87] Of course, these myths and misconceptions have been by promulgated by the High Court in cases like *Phillips*, an ASO case, and *McPhillamy*, a CSO case. S 97A overturns the myths and misconceptions for CSO cases. They also need to be overturned for ASO cases. The Royal Commission's reasoning in relation to the traditional undervaluation of the probative value of tendency evidence has application beyond CSO cases, indeed it also applies beyond ASO cases. In this respect, the term 'myths' may be misleading. This invokes the familiar 'rape myths' that defence counsel may seek to evoke by cross-examining an ASO complainant on her sexual history – the false notion 'that a complainant is more likely to have consented or that she is less worthy of belief' on account of her sexual experience.[88] Since the latter part of the 20th century these myths have been addressed by tightly regulating the admissibility of evidence on a complainant's sexual history.[89] 'Rape myths' are quite specific misconceptions relating to the sexual behaviour of women. They only arise in ASO cases. Other related narrow misconceptions about human behaviour may arise in ASO and CSO cases, for example, that genuine victims of sexual assault would make a prompt complaint – raise an immediate hue and cry. As recently as 1973, in *Kilby v The Queen*, the HCA supported a 'general rule' that the jury be directed that, 'in determining whether to believe [the complainant], they could take into account that she had made no complaint at the earliest possible opportunity'.[90] In the latter decades of the 20th century, this misconception, too, has been addressed through criminal procedure reform. Juries should be given a direction that aims to counter this false notion.[91]

87 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 February 2020, 1913 (Mark Speakman, Attorney General) 1915.
88 *R v Darrach* [2000] 2 SCR 443 [32] (Gonthier J).
89 Eg, *Criminal Procedure Act 2009* (Vic) ss 340-346; *Criminal Procedure Act 1986* (NSW) s 294CB.
90 *Kilby v The Queen* (1973) 129 CLR 460, 465 (Barwick CJ).
91 Eg, *Criminal Procedure Act 1986* (NSW) s 294; *Jury Directions Act 2015* (Vic) ss 51-54.

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		The reasoning problems identified by the Royal Commission leading to the undervaluation of tendency evidence do not have this narrow, content-specific nature. Of course, restricted by its terms of reference, the Royal Commission was focused on CSOs. In making its point, the Royal Commission drew on empirical research in suggesting it was misguided to demand particular or unusual similarities between the other misconduct and the charged offence in CSO cases. Such a demand assumes that child sex offenders are highly specialised in their offending. However, the Royal Commission's work showed that while child sex offenders may have particular preferences, many offend against "both girls and boys and children of quite different ages, … in a variety of ways [and] in different contexts – institutional, familial and others".[92] From this the Royal Commission suggested that it is unnecessary to demand detailed similarities in CSO cases. "The two most important similarities are already present – *sexual* offending against a *child*".[93] This is specific illustration of a more general point. While some criminals may specialise to a greater or lesser degree, 'criminological literature by and large agrees: offenders show considerable versatility, and a person who has committed one offence is at risk of committing further different offences'.[94] A good illustration is provided by US data relating police officer's misconduct on the job to their commission of domestic violence at home. Chicago police officers accused of domestic violence 2000-2016 received 50% more complaints than colleagues for excessive force.[95] One in five officers arrested for domestic violence in the US have also been subject of a federal lawsuit for violating people's civil rights.[96] It may be correct that, as the majority in *Hughes* suggested, the probative value of a tendency is in proportion with the "particularity"[97] with which it can be expressed. However, the Royal Commission's point, which is a general one, is that courts are mistaken to think that tendency evidence cannot gain significant probative without distinctive similarities.

92 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 606.
93 (emphasis in original).
94 Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press, 2015) 30.
95 Citizens Police Data Project, Chicago.
96 Philip Stinson, Bowling Green State University; Rachel Aviv, 'Show of Force', *New Yorker*, 7/10/19.
97 *Hughes v The Queen* (2017) 263 CLR 338; Gageler J used the term "specificity": for example [93].

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		Other reasoning problems identified by the Royal Commission also have a generic nature. One of the Royal Commission's points is based upon the jurisprudence of probative value. The Royal Commission pointed out that the demand for specificity "overlook[s] the fact that the probative value of the tendency or coincidence evidence should be assessed in the context of the issues and the other evidence in the trial".[98] The contextual approach to probative value (discussed above in relation to the fallacy that tendency evidence has greater force in commission cases than identity cases) has been endorsed by the High Court on several occasions at common law and under the *UEL*. At common law in *Phillips*, the Court held that, in assessing probative value, "due weight must be given to the necessity to view the similar fact evidence in the context of the prosecution case".[99] The majority in *Hughes* indicated that the requirement for significant probative value does not apply to "the disputed evidence … *by itself* [but to] the disputed evidence together with other evidence".[100] On the contextual approach, it seems that a weak connection between the other misconduct and the charged offence – for example, very few other instances of misconduct with only slight similarities with the charged offence – may be compensated by the prosecution having an otherwise strong case. An unqualified demand for a strong nexus or connection between the other misconduct and the charged offence fails to recognise that "the value of the tendency or coincidence evidence must be determined in light of the other prosecution evidence".[101] The Royal Commission also addressed a further misunderstanding of tendency reasoning contributing to its undervaluation. Commentators have argued that past offending provides a poor basis for predicting future offending.[102] On this view, low recidivism rates for child sex

98 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 594.
99 *Phillips v The Queen* (2006) 225 CLR 303, [63].
100 *Hughes v The Queen* (2017) 263 CLR 338, [40].
101 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 606. The *UEL* replicates the common law's ambiguity as to whether the assessment operates on the evidence standing alone or contextually. Sections 97 and 98 unhelpfully instruct the trial judge to assess the probative value of the evidence "either by itself *or* having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence" (emphasis added). Courts appear not to acknowledge the express ambiguity: for example, *BC v The Queen* [2019] NSWCCA 111, [75]; *DSJ v The Queen* (2012) 84 NSWLR 758, [72]; *R v Zhang* (2005) 158 A Crim R 504, [139]; *R v MR* [2013] NSWCCA 236, [70].
102 Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1, [394] (*Interim Report*); see also *Hughes v The Queen* (2017) 263 CLR 338, [184] (Nettle J).

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		offending indicate that propensity evidence lacks probative value.[103] The Royal Commission rejected this argument pointing out that a criminal court is concerned with proof of a past event and not prediction of a future event.[104] Evidence may be highly probative and make a strong contribution to proof without necessarily providing a confident basis for prediction. Consider motive evidence; the possession of a motive to kill may be predictively weak: "the vast majority of people with a motive to kill do not go on to commit murder".[105] However, motive evidence can be crucial "because people with a motive to kill are more likely to kill than those without a motive to kill: it is the comparative element which creates probative value".[106] In the same way, a person who has committed one sexual assault is not necessarily going to commit another, but they are far more likely to commit a (for them, further) sexual assault than someone without that history. The Royal Commission did not fully commit to this comparative propensity theory,[107] however, it is implicit in some authoritative and persuasive analyses of tendency reasoning, as discussed below in relation to s 98(1A).
98 The coincidence rule	1. Are there any issues in with the interpretation	***Tendency and coincidence reasoning: what's the difference?***

103 *Evidence*, Report No 26 (1985) Vol 1, [796]–[797]; Peter M Robinson, "Prior Convictions, Conduct and Disposition: A Scientific Perspective" (2016) 25 *Griffith Law Review* 197, 205; David Hoitink and Anthony Hopkins, "Divergent Approaches to the Admissibility of Tendency Evidence in NSW and Vic: The Risk of Adopting a More Permissive Approach" (2015) 39 Crim LJ 303, 323; Tamara Rice Lave and Aviva Orenstein, "Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes" (2013) 81(3) *University of Cincinnati Law Review* 795, 816; Charles H Rose, "Would the Tail Wag the Dog? The Potential Effect of Recidivism Data on Character Evidence Rules" (2006) 36 *New Mexico Law Review* 341. It is widely accepted that child sex offenders exhibit relatively low recidivism: for example, Taina Laajasalo et al, "Low Recidivism Rates of Child Sex Offenders in a Finnish 7-year Follow-up" (2020) 21 *Nordic Journal of Criminology* 103. However, some child sex offenders commit many offences: "On 4 October 2010, Gerard Vincent Byrnes was sentenced to 10 years' imprisonment, including a non-parole period of eight years, after he pleaded guilty to 44 child sexual abuse offences against 13 girls who were then aged between eight and 10 years": Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 6: The Response of a Primary School and the Toowoomba Catholic Education Office to the Conduct of Gerard Byrnes* (2015) 4.

104 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 604, 607.

105 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017)607, quoting Mike Redmayne, *Character in the Criminal Trial* (OUP, 2015) 16–17.

106 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 607.

107 Royal Commission, Parts III-VI above 603.

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(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	of section 98(1A) of the Evidence Act in child and/or adult sexual offence proceedings? 2. Please provide any other comments you have about section 98(1A).	S 98(1A) seeks to make it clear that the prosecution may rely upon sexual assault allegations of a number of alleged victims against a defendant as coincidence evidence. For example, where the defence argues that the alleged victims are all lying, the prosecution may respond in terms of the improbability of similar lies.[108] S 98(1A) is a strange reform. For one thing, it seems unnecessary. It appears to be directed towards the objection, raised in a couple of cases, that it would "strain the natural and ordinary meaning of the words"[109] to bring other allegation evidence evidence under s 98. According to this objection, s 98 is concerned with "objective" similarities in events and not similarities in witnesses' subjective accounts.[110] But this objection, as well as being pedantic and unpersuasive,[111] has received little support.[112] S 98(1A) is also strange in that it is at odds with s 97A. While s 98(1A) appears to be encouraging prosecutors to tender other allegations as coincidence evidence, s 97A provides a powerful incentive for other allegations to be tendered as tendency evidence. If the other allegations are tendered as coincidence evidence, they will not receive the considerable benefit of the s 97A presumption of significant probative value. The difficult relationship between s 97A and s 98(1A) highlights the problematic nature of the distinction that Part 3.6 draws between tendency evidence and coincidence evidence. Limiting the benefit of the s 97A presumption to tendency evidence reflects a view, predating the reforms, that it is harder for coincidence evidence to acquire probative value than tendency evidence. To gain admission, "coincidence evidence will ordinarily need to exhibit a greater

108 Eg *DPP v Boardman* [1975] AC 421, 444; *Hoch v The Queen* (1988) 165 CLR 292, 295.
109 *Tasmania v Y* (2007) 178 A Crim R 481, [37] (Crawford J).
110 *Tasmania v Y* (2007) 178 A Crim R 481; citing *R v WRC* (2002) 130 A Crim R 89, [36] (Hodgson JA).
111 Rarely will a court have access to events other than through witness accounts. The reference in s 98 to "similarities in the events or the circumstances in which they occurred" should be interpreted to cover similarities in the witness accounts rather than just the inaccessible "objective" features.
112 *Tasmania v Y* (2007) 178 A Crim R 481 appears to have only been cited by Tasmanian courts. This aspect of *R v WRC* (2002) 130 A Crim R 89 does not appear to have been taken up by other courts. Courts have regularly brought this evidence under s 98 and *IMM v The Queen* (2016) 257 CLR 300 envisages such evidence being handled under s 98: [59]. See Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 13th ed, 2018) [101.120].

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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. (1A) To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding. …		level of similarity, or commonality of features, than is required for tendency evidence".[113] This line of authority lacks a sound policy basis. The more stringent requirements for coincidence evidence appear to be largely based upon a misreading of a fine detail in the language of the coincidence rule in the UEL, namely the presence of the term "similarity" in the *definition* of coincidence evidence. But this goes to the scope of the *exclusion*, not the requirement for *admissibility*. Nevertheless, from this courts have drawn the non sequitur that the admission of coincidence evidence "does, in terms, depend upon similarity. Tendency evidence does not".[114] "[T]he existence of similarities is a necessary condition of the admissibility of coincidence evidence."[115] It is this illogical line of authority, which the reforms entrench and strengthen, that explains the trend towards other allegations being tendered as tendency evidence rather than coincidence evidence. In this respect, the reforms do not follow the Royal Commission's recommendations. The Royal Commission saw "little merit in maintaining" the distinction between tendency and coincidence evidence which, it suggested, "seems to be … artificial."[116] While the Royal Commission did not go so far as recommending that the distinction be abolished at this stage, it "anticipate[d that this would happen] in due course".[117] The Royal Commission certainly did not recommend that the artificial distinction be entrenched and reinforced by limiting the reforms to tendency evidence.[118] The Royal Commission followed a different more considered line of authority which views the distinction as problematic. Coincidence evidence and tendency evidence "overlap";[119] there is

113 *Page v The Queen* [2015] VSCA 357, [53]; see also *El-Haddad v The Queen* (2015) 88 NSWLR 93, [48]; *O'Keefe v The Queen* [2009] NSWCCA 121, [64]; *Rapson v The Queen* (2014) 45 VR 103, [11]; *CEG v The Queen* [2012] VSCA 55, [21]–[22]; *R v PWD* (2010) 205 A Crim R 75, [79].
114 *RJP v The Queen* (2011) 215 A Crim R 315, 335 [113]; see also *RHB v The Queen* [2011] VSCA 295, [17]; *R v PWD* (2010) 205 A Crim R 75, [50], [78]–[79]; *Velkoski v The Queen* (2014) 45 VR 680, [176]; *Page v The Queen* [2015] VSCA 357, [46], [54].
115 *Page v The Queen* [2015] VSCA 357, [46].
116 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) Parts III–VI, 643.
117 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).
118 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 642.
119 *El-Haddad v The Queen* (2015) 88 NSWLR 93, [46], citing *KJR v The Queen* (2007) 173 A Crim R 226, [46].

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		"awkwardness" in distinguishing between them.[120] As Basten JA in *Saoud v The Queen* (*Saoud*)[121] observed, "[the admission of] 'tendency' evidence will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity."[122] It is arguable that the distinction between tendency and coincidence evidence is not only awkward, it is fallacious.[123] The apparent difference between the two is largely one of characterisation. The probative value of tendency evidence depends not only on the strength of the tendency and the likelihood of the defendant engaging in the conduct, but also on the unusualness of the conduct, a coincidence notion. The probative value of tendency evidence will be greater where the conduct is unusual. Given the unusualness of the conduct it would be a coincidence to find that the defendant, though innocent, has an incriminating tendency. Correspondingly, the probative value of coincidence evidence depends not only on the unusualness of the conduct, but the strength of the tendency, and the likelihood of it producing the charged conduct. In *Saoud*, in which two female co-workers made similar allegations against the defendant, Basten JA appreciated that the evidence relied simultaneously upon both coincidence and tendency notions. The inference "combine[d] the implausibility of independent complainants both falsely describing similar conduct with the inference that a person who conducted himself in a particular way on one occasion may well have done so again on another".[124] In *Hughes*, a tendency evidence case, the High Court also referred to the notion of coincidence in relation to the probative value assessment. The majority suggested that it is not only a matter of the strength of the tendency and whether "a person who has a tendency … to act in a particular way … may not have acted in that way, on the occasion in issue".[125] Regard

120 *Saoud v The Queen* (2014) 87 NSWLR 481, [43]. See also *Page v The Queen* [2015] VSCA 357, [4], [51]; *RHB v The Queen* [2011] VSCA 295, [17].
121 Ibid.
122 Ibid [44], see also at [28].
123 David Hamer '"Tendency Evidence" and "Coincidence Evidence" in the Criminal Trial: What's the Difference?' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* 2017), 168–170; David Hamer, 'The Significant Probative Value of Tendency Evidence' (2019) 42 *Melbourne University Law Review* 506, 530–533.
124 *Saoud v The Queen* (2014) 87 NSWLR 481, [43].
125 *Hughes v The Queen* (2017) 263 CLR 338, [17].

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		should also be had to "the number of persons who share the tendency to … act in that way".[126] Gageler J combined considerations of tendency and coincidence in a relative judgment. The question is whether the tendency is "so abnormal … that a man shown to have such a tendency is … more likely than other men to have engaged in [the behaviour]".[127] The degree of probative value depends upon "how much more likely".[128] This reasoning, involving the relative consideration tendency and coincidence elements, is the comparative propensity reasoning discussed above in relation to s 97A. Whether or not one thinks there is a genuine distinction between tendency and coincidence evidence, the potential for overlap, in many cases, cannot be denied. The Victorian *Criminal Charge Book* instructs that "[c]are must be taken to distinguish 'tendency evidence' from 'coincidence evidence'".[129] This is consistent with authority but it appears that forcing the evidence into one category or the other does more harm than good. If forced to select a single category, the prosecution will often have a genuine choice. However, as discussed above, gaining admissibility will be easier if the prosecution selects the tendency category. In most CSO cases prosecution evidence of a defendant's other misconduct evidence will fit the tendency characterisation quite readily. For example, evidence that the defendant has previously pleaded guilty to CSO charges can be taken as evidence that the defendant has committed CSOs before and has a tendency commit CSOs.[130] Despite fitting squarely within the definition of tendency evidence, guilty pleas may also be viewed as coincidence evidence. The trial judge may consider that the defendant's previous guilty plea on similar charges would be a "remarkable coincidence" if the defendant were innocent on the current charges.[131]

126 Ibid.
127 Ibid [109].
128 Ibid.
129 Judicial College of Victoria, *Criminal Charge Book* (2020) 4.18 [5], citing *R v Nassif* [2004] NSWCCA 433; *Gardiner v The Queen* (2006) 162 A Crim R 233; *KJR v The Queen* (2007) 173 A Crim R 226, [46]; see also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (February 2021) [4-200], [4-235].
130 For example, *Page v The Queen* [2015] VSCA 357, [4].
131 *Pfennig v The Queen* (1995) 182 CLR 461, 542 (McHugh J).

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		Traditionally, evidence of other allegations has been viewed as coincidence evidence. Highlighting the similarities between the allegations of the various witnesses, the prosecution would rely upon the improbability that they would all tell similar lies.[132] In *Velkoski*,[133] the VCA suggested that evidence of other CSO allegations would be "more potent" as coincidence evidence than as tendency evidence. In *Cox*,[134] an ASO case involving other allegations, the VCA indicated that the trial judge was right to "not allow the Crown to run both tendency and coincidence in the same trial".[135] The evidence was only available for coincidence reasoning.[136] Courts may be reluctant to extend the tendency categorisation cases where the defendant's link to other misconduct is weak and circumstantial. In *El-Haddad*,[137] the defendant was linked to the importation of several packages of drugs but denied responsibility for any of them. The NSWCCA indicated that while "little distinction was made between the tendency rule and the coincidence rule at trial"[138] it "would regard this case as being one which predominantly involves coincidence reasoning".[139] In *Gardiner*[140] the defendant, the President of a motorcycle club, was charged with several counts of illegal possession of weapons largely on the basis that the weapons were found in two of the club's premises. The NSWCCA appeared to consider that the evidence could be characterised as coincidence evidence (though lacking

132 Donald Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (1982) 38; Zelman Cowen and Peter B Carter, "The Admissibility of Evidence of Similar Facts: A Re-examination" in Zelman Cowen and Peter B Carter (eds), *Essays on the Law of Evidence* (OUP, 1956) 116. *Velkoski v The Queen* (2014) 45 VR 680, [175]. The third possibility, in addition to the witnesses telling the truth or coincidentally telling a similar falsehood (through dishonesty or mistake), is that the witnesses arrived at the same false accusation through a common cause, concoction or contamination: *DPP v Boardman* [1975] AC 421, 444 (Lord Wilberforce); *Hoch v The Queen* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ). Under the *UEL* this third possibility, however, is generally not to be considered by the trial judge at the admissibility stage as discussed above in relation to s 94(5).
133 (2014) 45 VR 680.
134 *Cox v The Queen* [2015] VSCA 28.
135 Ibid [21].
136 See also *Jacobs v The Queen* [2017] VSCA 309, an adult sexual offence case involving multiple allegations which the prosecution characterised as coincidence evidence.
137 *El-Haddad v The Queen* (2015) 88 NSWLR 93.
138 Ibid [51].
139 Ibid [50].
140 *Gardiner v The Queen* (2006) 162 A Crim R 233.

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		sufficient probative value for admission) but not as tendency evidence.[141] This kind of challenge to the tendency characterisation issue could be made in CSO cases where the defendant is implicated by circumstantial rather than direct evidence, for example, where the perpetrator was a stranger to the alleged victims, or they are too young to identify the perpetrator. And yet the tendency characterisation could not be ruled out altogether. To the extent that evidence indicates that the other harms are the product of the defendant's misconduct, then there is an argument that the evidence shows (however weakly) the defendant's tendency to engage in that kind of misconduct. Given the strongly preferential treatment received by tendency evidence under the new s 97A, prosecutors may be prepared to push more strongly for tendency characterisation such cases. The categorisation issue may then loom large at trial, and possibly again on appeal. This technicality is unnecessary and counterproductive. One of the difficulties in forcing the other misconduct into one category or the other is that the evidence may fit one category better at the admissibility stage, and another category at the proof stage. As discussed above in relation to s 94(5), it appears that, at admissibility, the trial judge should take the evidence at its highest and assume that the witness is credible and reliable. Other allegations of sexual assault should be accepted as true. This precludes the trial judge from adopting 'improbability of similar lies' reasoning,[142] and will assist the prosecution in advancing the tendency characterisation to take advantage of s 97A. The coincidence – 'improbability of similar lies' – characterisation may still be useful for the jury. And yet, if the evidence is characterised as tendency evidence for admissibility purposes, the coincidence notion may be precluded at the proof stage.[143] A further problem with this modern preference for the tendency characterisation – strengthened significantly by the reforms – is that it may increase the risk of prejudice. It is interesting to note that the early common law lay in the opposite direction. On one view, the law imposed an absolute prohibition on tendency ("propensity" or "character") reasoning.

141 Ibid, [133] (Simpson J). See also at [61] (McClellan CJ at CL).
142 Hamer, 'What's the Difference' above 160.
143 See also *Doyle v The Queen* [2014] NSWCCA 4 [100], [103], [145]; *KJR* (2007) 173 A Crim R 226 [3], [52]; *Gardiner* (2006) 162 A Crim R 233 [117].

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		Coincidence (or "improbability") reasoning was seen as a way of avoiding this prohibition.[144] Tendency reasoning was viewed as more prejudicial than coincidence reasoning because it asserts that the defendant actually had engaged in the other misconduct (and was a bad person). Coincidence reasoning does not commit to this position, leaving open the possibility that the defendant has been wrongly implicated.[145] It is interesting to note, as well, that South Australian legislation admits coincidence evidence more readily than evidence "that relies on … propensity or disposition".[146]
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	1. Are there any issues in with the interpretation of section 101(2) of the Evidence Act in child and/or adult sexual offence proceedings? 2. Please provide any other comments you have about section 101(2).	This reform, in removing the asymmetry from the balancing test, is an improvement. However, the prejudicial potential of tendency and coincidence raises many further questions worthy of more thorough consideration, including the capacity of directions to mitigate or remove the risk of prejudice.

144 Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1, 83 [165]; Edward J Imwinkelreid, "An Evidentiary Paradox: Defending the Character Evidence Prohibition By Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances" (2006) 40 *University of Richmond Law Review* 419.
145 *Pfennig v The Queen* (1995) 182 CLR 461, 530 (McHugh J); 77 A Crim R 149; see also *Mahomed v The Queen* [2011] 3 NZLR 52, [89] (McGrath and William Young JJ); *Gardiner v The Queen* (2006) 162 A Crim R 233, [135] (Simpson J); [2006] NSWCCA 190; Law Reform Commission, *Evidence*, Report No 26 (1985) Vol 1, 220 [400]; David Hamer, "The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence" (2003) 29 *Monash University Law Review* 137, 159; David Hamer, "The Case for Principled and Practical Propensity Evidence Reform" (2020) 94 *Australian Law Journal* 239.
146 *Evidence Act 1929* (SA) s 34P(2)(b); *MDM v The Queen* (2020) 136 SASR 360, [57], [79], [84], [103], [107]–[108], [111], [116]–[117].

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outweighs the danger of unfair prejudice to the defendant. …		