27. Evidence in Sexual Assault Proceedings

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Introduction

27.1 The previous chapter discussed some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other stages before cases reach trial.

27.2 This chapter, and Chapter 28, examine selected issues that arise in the trial of sexual assault cases. This chapter deals with aspects of the application of the laws of evidence. Chapter 28 deals with the giving of jury warnings, the cross-examination of
complainants and other witnesses in sexual assault proceedings and certain other aspects of giving evidence.

27.3 These issues have been selected because the application of law in these areas has a direct and significant impact on the experiences in the criminal justice system of women and children who have suffered sexual assault, including in a family violence context—the focus of the Commissions’ Terms of Reference. The way in which these aspects of the law are applied may lead to cases being withdrawn at a late stage or tried without the full evidentiary picture being before the jury. The procedures required at trial may make complainants reluctant to continue to give evidence in sexual assault proceedings.

Evidence issues

27.4 Evidence issues of particular concern in the context of sexual assault proceedings include the law and procedure relating to: evidence of sexual reputation and experience; the disclosure of confidential counselling communications; expert opinion evidence and children; tendency and coincidence evidence; relationship evidence; and evidence of recent and delayed complaint.

27.5 While these issues may appear disparate, there are some common themes—notably those relating to consent and credibility. Evidence issues often arise where the defence is seeking to show that sexual activity was consensual and, in doing so, to undermine the credibility of the complainant. This can sometimes result in unjustifiable trauma to complainants. In other contexts, the policy challenge is posed by evidence of prior misconduct by the defendant, which is highly prejudicial and may carry a risk of wrongful conviction. At the same time, it can be highly important and probative evidence.1

27.6 The rules of evidence vary among jurisdictions depending, in particular, on whether the uniform Evidence Acts apply. In this Report, the term ‘uniform Evidence Acts’ is used to refer to legislation based on the Model Uniform Evidence Bill, which was considered and endorsed by the Standing Committee of Attorneys-General (SCAG) in July 2007, or on the Evidence Act 1995 (Cth) and Evidence Act 1995 (NSW). The Model Uniform Evidence Bill is based on these latter Acts, with amendments recommended in Uniform Evidence Law (ALRC Report 102).2

27.7 The Australian Government has an ongoing commitment to the harmonisation of evidence law across Australian jurisdictions through the work of the SCAG National Working Group on Evidence. Recommendations for reform of the uniform Evidence Acts made in this Report need to be considered by the Australian and state and territory governments through the mechanism of SCAG.

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2 Ibid, [11.15].
27.8 The uniform Evidence Acts jurisdictions are the Commonwealth, NSW, Victoria, Tasmania, the ACT (which applies the federal legislation) and Norfolk Island.\(^3\) There are minor differences in the uniform Evidence Acts applying in these jurisdictions.\(^4\) The uniform Evidence Acts work in conjunction with evidentiary provisions contained in a range of other federal, state and territory legislation.

27.9 As discussed in ALRC Report 102, the uniform Evidence Acts in their entirety are not a code of the law of evidence. The enactment of the uniform legislation resulted in substantial changes to the common law in some areas. In other areas the common law remains an important reference assisting application of the uniform Evidence Acts. Stated simply, the uniform Evidence Acts govern admissibility issues, but reference to the common law can facilitate an understanding of underlying concepts and help to identify the changes brought about by the Acts.\(^5\)

27.10 In other jurisdictions, referred to for convenience as ‘common law evidence jurisdictions’,\(^6\) the common law has also been modified by statute in significant and varying ways, including in relation to the admissibility of evidence in sexual offence proceedings.

**Sexual reputation and experience**

27.11 This section considers legislation intended to restrict the admission of evidence of a complainant’s sexual reputation and sexual experience. A number of complexities arise in analysing existing legislation of this kind.

27.12 First, existing restrictions apply to evidence defined in varying ways, including as evidence of sexual reputation, sexual history, sexual experience and sexual activities. The implications of this terminology are considered below. For convenience, the Report uses the term sexual experience to mean the sexual activities (consensual or non-consensual) of a complainant.

27.13 Secondly, existing legislative provisions not only restrict the admission of sexual reputation and sexual experience evidence generally, but also for specific purposes—including for the purpose of establishing that the complainant is the ‘type’ of person who is more likely to consent to sexual activity, or as an indicator of the complainant’s truthfulness.\(^7\)

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\(^3\) The corresponding legislation comprises: Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2008 (Vic); Evidence Act 2001 (Tas); Evidence Act 2004 (NI).

\(^4\) For example, the Tasmanian Act has a number of sections not found in the Commonwealth or NSW legislation, such as those dealing with procedures for proving certain matters, certain privileges, certain matters concerning witnesses and rape shield provisions.


\(^6\) In 2006, the Northern Territory Law Reform Committee recommended that the uniform Evidence Act be adopted in the Northern Territory: Northern Territory Law Reform Committee, *Report on the Uniform Evidence Act* (2006).

\(^7\) The relationship between these provisions and the uniform Evidence Acts has previously been considered by the Commissions: Australian Law Reform Commission, New South Wales Law Reform Commission
Evidence of witnesses who are not complainants

27.14 State and territory legislation generally restricts the admission of evidence of the complainant’s sexual reputation and sexual experience in proceedings in which a person stands charged with a sexual offence. The Commonwealth restrictions apply to every child witness in sexual assault proceedings.

27.15 The provisions therefore do not apply to evidence about the sexual reputation or sexual experience of the following groups:

- in the Commonwealth jurisdiction, adult sexual assault complainants in sexual assault proceedings;
- in all jurisdictions, adult sexual assault victims who are witnesses, but not complainants in sexual assault proceedings; and
- in the state and territory jurisdictions, child witnesses who are not complainants in a sexual assault proceeding.

Submissions and consultations

27.16 In the Consultation Paper, the Commissions asked whether federal, state and territory evidence laws and procedural rules should limit the admission of evidence about the sexual reputation and prior sexual history of all witnesses in sexual assault proceedings.

27.17 A number of stakeholders supported the extension of legislative restrictions in relation to the admission of evidence about sexual reputation and sexual experience to all witnesses in sexual assault proceedings.

27.18 Women’s Legal Service Queensland suggested that it would be unusual for evidence about the sexual reputation or sexual experience of a witness who is not the complainant to be relevant in sexual assault proceedings.

8 Criminal Procedure Act 2009 (Vic) s 339(1); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4; Evidence Act 1906 (WA) s 36A; Evidence Act 1929 (SA) s 34L(1); Evidence Act 2001 (Tas) s 194M(1); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 49; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4.

9 Crimes Act 1914 (Cth) ss 15Y, 15YB, 15YC.


27.19 The Commissions consider that, in practice, questions are not likely to arise often concerning the admissibility of evidence of the sexual reputation or sexual experience of a witness who is not the complainant in sexual assault proceedings. One possible scenario might involve attempts to adduce sexual experience evidence about a witness who has been engaged in prostitution, in order to impugn her credibility.

27.20 Where such evidence is sought to be adduced, existing evidence law may adequately deal with the possibility. For example, evidence about the sexual reputation or sexual experience of a witness may fail the relevance requirement under s 55 of the uniform Evidence Acts. If questioning on the subject is intended to harass or intimidate the witness, questioning may (or must) be disallowed under s 41 of the uniform Evidence Acts. Finally, if the evidence is sought to be admitted in cross-examination as to credibility, it will be excluded under s 102 of uniform Evidence Acts unless it ‘could substantially affect the assessment of the credibility of the witness’.13

27.21 While some stakeholders suggested existing restrictions in relation to the admission of evidence of sexual reputation or sexual experience should be extended to all witnesses, the Commissions consider that there are insufficient grounds to make such a recommendation.

**Terminology**

27.22 Australian legislation restricts the admission of evidence variously described as being of:

- the general reputation of the complainant with respect to chastity;14
- sexual reputation;15
- reputation with respect to sexual activities;16
- disposition of the complainant in sexual matters,17 or evidence that raises inferences about a complainant’s general disposition;18
- sexual history.19

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13 Uniform Evidence Acts, s 103.
14 Criminal Procedure Act 2009 (Vic) s 341. Section 4(1)(b) of the Sexual Offences (Evidence and Procedure) Act 1983 (NT) uses a similar phrase: ‘the complainant’s general reputation as to chastity’.
15 Criminal Procedure Act 1986 (NSW) s 293(2); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(1); Evidence Act 1906 (WA) s 36B; Evidence Act 1929 (SA) s 34L(1)(a); Evidence Act 2001 (Tas) s 194M(1)(a); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 50.
16 Crimes Act 1914 (Cth) s 15YB.
17 Evidence Act 1906 (WA) s 36BA; Evidence Act 2001 (Tas) s 194M(6)(b).
18 Crimes Act 1914 (Cth) s 15YC; Criminal Procedure Act 2009 (Vic) s 352(a); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(4); Evidence Act 1929 (SA) s 34L(3); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 53(2); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(2)(a).
19 Criminal Procedure Act 2009 (Vic) ss 340, 343.
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- sexual experience,\(^{20}\) or sexual experiences,\(^{21}\) and
- ‘experience with respect to sexual activities’,\(^{22}\) ‘sexual activity’,\(^{23}\) or ‘sexual activities’.\(^{24}\)

27.23 Statutory and judicial guidance\(^{25}\) about the meaning and boundaries of each of these terms and the kinds of evidence covered are limited.\(^{26}\) In practice, this uncertainty may inhibit the ability of judicial officers and practitioners to apply and observe the current legislative provisions.\(^{27}\)

**Submissions and consultations**

27.24 In the Consultation Paper, the Commissions asked how judicial officers and legal practitioners can best be assisted to develop a consistent approach to the classification of evidence as being of ‘sexual reputation’ as compared with ‘sexual experience’ (or ‘sexual activities’).\(^{28}\)

27.25 National Legal Aid noted that the operation of the legislative provisions governing these kinds of evidence is not monitored, but should be, and that there is often no empirical evidence to assess whether the intention of Parliament in enacting particular provisions is being met.\(^{29}\) A number of other stakeholders observed that the classification of evidence as being of ‘sexual reputation’ or ‘sexual experience’ is not an issue in practice.\(^{30}\)

27.26 The Magistrates’ Court and Children’s Court of Victoria suggested that multifaceted education and training would assist the development of a consistent approach to the classification of evidence as being of ‘sexual reputation’ or ‘sexual experience’. This should include targeted judicial professional development.\(^{31}\)

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20 Ibid s 293(4); Evidence Act 2001 (Tas) s 194M(1)(b).
21 Evidence Act 1906 (WA) s 36BC.
22 Crimes Act 1914 (Cth) s 15YC.
23 Criminal Procedure Act 1986 (NSW) s 293(3); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(2).
24 Criminal Procedure Act 2009 (Vic) s 342; Evidence Act 1929 (SA) s 34L(1)(b); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 51; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1)(b).
26 For further discussion about the meaning and boundaries of the terms, see Consultation Paper, [18.16]–[18.20].
27 For example, an empirical study undertaken in relation to sexual assault hearings in the District Court of New South Wales over a one year period between 1 May 1994 and 30 April 1995 concluded that sexual reputation evidence cannot be clearly distinguished from sexual experience evidence: J Bargen, Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project (1996), 11. In the context of the Western Australian legislation, ‘a difficulty arises because evidence of a complainant’s sexual experiences, which is made admissible by s 36BC, will often, but not necessarily, also be evidence relating to a person’s sexual disposition’ which shall not be adduced or elicited by or on behalf of an accused: Bull v The Queen (2000) 201 CLR 443, [61].
28 Consultation Paper, Question 18–2.
29 National Legal Aid, Submission FV 232, 15 July 2010; Legal Aid NSW, Submission FV 219, 1 July 2010.
30 Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission, Consultation, Alice Springs, 2010.
31 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
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Commissions’ views

27.27 It is important that sexual reputation evidence is distinguishable from sexual experience evidence because, broadly speaking, sexual reputation evidence is inadmissible in most jurisdictions, whereas sexual experience evidence is admissible in some circumstances. However, it is not clear whether, or to what extent, evidence is inconsistently categorised in practice.

27.28 The Commissions suggest that this is an area in which empirical research might usefully be conducted to establish how existing provisions are being applied and interpreted in sexual assault proceedings. Judicial and practitioner education concerning relevant definitions and their boundaries may also assist to ensure that the concepts are more clearly understood and delineated.

Sexual reputation

27.29 Evidence relating to a complainant’s sexual reputation is inadmissible in all Australian states and the ACT.32 Evidence of sexual reputation is excluded on the basis that, ‘even if relevant and therefore admissible, [it] is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances’.33

27.30 In the Northern Territory, evidence relating to the complainant’s general reputation as to chastity may be elicited or led with the leave of the court. Leave is not granted unless the evidence has substantial relevance to the facts in issue.34

27.31 Under federal legislation, evidence of a child witness or child complainant’s sexual reputation is only admissible in a proceeding if the court is satisfied that the evidence is substantially relevant to the facts in issue.35

Submissions and consultations

27.32 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that a court must not admit any evidence of the sexual reputation of the complainant.36

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32 Criminal Procedure Act 1986 (NSW) s 293(2); Criminal Procedure Act 2009 (Vic) s 341; Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(1); Evidence Act 1986 (WA) s 36B; Evidence Act 1929 (SA) s 34L(1)(a); Evidence Act 2001 (Tas) s 194M(1)(a); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 50.
35 Crimes Act 1914 (Cth) s 15YB.
36 Consultation Paper, Proposal 18–1.
27.33 Stakeholders generally supported the proposal. Some stakeholders, however, preferred a model where sexual reputation evidence may be elicited or led with the court’s leave. The Magistrates’ Court and Children’s Court of Victoria noted that the Consultation Paper proposal went further than the current restrictions in Victoria and that any such law needs to be supported by judicial education and lawyer accreditation in family violence and sexual assault.

Commissions’ views

27.34 The Consultation Paper proposal reflected the current legal position in most jurisdictions. It is clear that the policy basis for excluding evidence of sexual reputation—that it is too far removed from the evidence of actual events or circumstances for its admission to be justified in any circumstances—is widely accepted. However, the federal and Northern Territory exclusionary rules do not give the policy full effect.

27.35 In the Commissions’ view, federal, state and territory legislation should be consistent in providing that the court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant. Judicial and practitioner education concerning the scope of evidence of sexual reputation may be desirable.

Recommendation 27–1 Federal, state and territory legislation should provide that complainants of sexual assault must not be cross-examined in relation to, and the court must not admit any evidence of, the sexual reputation of the complainant.

Sexual experience

27.36 Australian jurisdictions have adopted different approaches to the admission of evidence of the complainant’s sexual experience—described variously as evidence of ‘sexual activities’, ‘sexual activity’, ‘sexual experiences’ and ‘sexual experience’.

27.37 This issue is an important one for all complainants in sexual assault cases for whom the admission of sexual experience evidence can have the effect of re-traumatising through humiliation and ‘victim-blaming’.


38 National Legal Aid, Submission FV 232, 15 July 2010; Northern Territory Legal Aid Commission, Submission FV 122, 16 June 2010.

39 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
27.38 The Commissions have heard that evidence of a complainant’s prior sexual history is more likely to be admitted in proceedings concerning sexual offences perpetrated in a family violence context, as compared with other sexual assault proceedings.40

27.39 Sexual experience evidence may also reinforce certain prejudices that jury members may hold. Statutory restrictions relating to the admission of sexual experience evidence have been enacted to curtail reasoning influenced by what have been described as the ‘twin myths’.41 That is,

to forbid any chain of ‘reasoning’ that asserts that, because the complainant has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual experiences, he or she is the ‘kind of person’ who would be more likely to consent to the acts the subject of the charge … [and] to forbid the chain of ‘reasoning’ that asserts that, because a complainant has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a complainant without those features.42

Scope of the restrictions

27.40 The issues in this area include whether rules prohibiting the admission of evidence of sexual experience should apply to evidence of the complainant’s:

- sexual experience with the defendant, as well as with other persons; or
- non-consensual, as well as consensual, sexual experiences.

27.41 In the ACT, the restrictions apply only to evidence about sexual activity with persons other than the accused.43 In Victoria, Western Australia and Tasmania the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the defendant.44 In the remaining jurisdictions, the sexual experience or conduct provisions do not restrict the admission of evidence about ‘recent’ sexual activity between the complainant and the defendant.45

27.42 The Victorian legislation is unique in expressly restricting questions and evidence about both the consensual and non-consensual sexual activities of the complainant.46 The legislation covers non-consensual sexual activities in order to clearly restrict cross-examination of complainants about earlier incidents of child

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40 Ibid; Women’s Legal Service Queensland, Submission FV 185, 25 June 2010.
42 Bull v The Queen (2000) 201 CLR 443, [53].
44 Criminal Procedure Act 2009 (Vic) s 342; Evidence Act 1906 (WA) s 36BC(1); Evidence Act 2001 (Tas) s 194M(1)(b).
45 Criminal Procedure Act 1986 (NSW) s 293(4); Criminal Procedure Act 1986 (NSW); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(4) and Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(3) (acts which are ‘substantially contemporaneous’); Evidence Act 1929 (SA) s 34L(1)(b) (‘recent sexual activities with the accused’).
sexual abuse or sexual assault. The Victorian Law Reform Commission (VLRC) noted that:

in many cases the main purpose of this type of cross-examination is to unsettle the complainant by suggesting he or she is prone to lie or is mentally unstable ...

Many complainants find it difficult to understand why the defence should be able to cross-examine them about prior abuse when evidence about the accused’s prior sexual behaviour is rarely admissible and the accused is entitled to exercise the right to remain silent.

27.43 In all jurisdictions, except Western Australia, the sexual experience provisions apply to evidence adduced or elicited by the prosecution or the defendant. In Western Australia the provisions apply only where the evidence is adduced or elicited by the defendant.

**Discretionary and mandatory approaches**

27.44 Another important distinction between the different approaches to restricting the admission of evidence of the complainant’s sexual experience is whether or not admissibility is subject to leave granted by a judicial officer in an exercise of their discretion.

27.45 New South Wales is the only Australian jurisdiction in which a judicial officer does not have an overriding or residual discretion to admit sexual experience evidence. Section 293 of the *Criminal Procedure Act 1986* (NSW) provides that sexual experience evidence is inadmissible unless it falls within a specific statutory exception. Evidence which falls outside of the exceptions is excluded.

27.46 In all other Australian jurisdictions, admissibility is a matter for the judicial officer’s discretion, the exercise of which is subject to legislative criteria.

**Submissions and consultations**

27.47 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that the court must not admit any evidence as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates, without the leave of the court.

27.48 Stakeholders expressed support for the Consultation Paper proposal. Some stakeholders commented that the NSW approach to the exclusion of sexual experience

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49 *Evidence Act 1906* (WA) ss 36A–36BC.
50 Consultation Paper, Proposal 18–2.
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27.49 The main policy objective informing restrictions on admitting sexual experience evidence concerns minimising the distress, humiliation and embarrassment experienced by complainants who testify at trial. To adequately safeguard sexual assault complainants against such distress, particularly where such evidence is sought to be adduced through cross-examination, restrictions should have broad application.

27.50 Restrictions should apply to evidence of both the consensual and non-consensual sexual experience of the complainant. This should prevent evidence of prior sexual assault and incidents of sexual abuse in childhood being admitted. It will also ensure that survivors of sexual abuse are offered protection from investigation into their sexual history. The provisions should also apply to the complainant’s sexual experience with the accused and with other persons, regardless of whether the experience was ‘recent’ or not.

27.51 The Commissions therefore support the enactment of legislation similar to s 342 of the Criminal Procedure Act 2009 (Vic), which states:

The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or nonconsensual) of the complainant (other than those to which the charge relates), without the leave of the court.

27.52 In the Commissions’ view, such restrictions on the admission of evidence of the complainants’ sexual experience are unlikely to cause injustice to the defendant, provided that any evidence covered by the rule may be admitted with the leave of the court.

27.53 Concerns about whether the admissibility of sexual experience evidence is better dealt with by the statutory exception approach of NSW or the discretion-based approaches of other jurisdictions have been canvassed in reports by the former Model Criminal Code Officers Committee of SCAG (MCCOC)—now the Model Criminal Law Officers Committee—the New South Wales Law Reform Commission

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52 Barrister, Consultation, Sydney, 10 June 2010; NSW Legal Assistance Forum, Consultation, Sydney, 10 May 2010.
53 The experience of testifying at trial is sometimes said to cause complainants almost as much trauma as the actual assault, and the anticipated admission of sexual history evidence may contribute to the reluctance of many women to report sexual assaults to the police. See, eg, S Bronitt and T Henning, ‘Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence’ in P Easteal (ed) Balancing the Scales: Rape, Law Reform and Australian Culture (1998) 76, 81; J Bargen and E Fishwick, Sexual Assault Law Reform: A National Perspective (1995), prepared for the Office of the Status of Women, 75.
55 The circumstances in which the leave of the court may be granted are discussed below.
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(NSWLRC) and VLRC. These reports considered the relative merits of each approach and whether the statutory exception approach is too restrictive and excludes material relevant to the defendant’s defence. Each report favoured a structured discretionary model.

27.54 In the Commissions’ view, the relevant issues related to each approach—for both complainants and defendants—have been sufficiently canvassed in, and appropriately evaluated by, these earlier reports. The Commissions agree that the admission of sexual experience evidence should be determined by judicial officers exercising their discretion in accordance with criteria set out in legislation. The discussion that follows focuses on identifying the optimal formulation for this approach.

### Recommendation 27–2

Federal, state and territory legislation should provide that the complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, without the leave of the court.

#### Granting leave to adduce sexual experience evidence

27.55 The discussion below considers the legislative criteria that apply to the judicial discretion to grant leave to admit evidence of the complainant’s sexual experience, including where the evidence is sought to be admitted because it:

- may raise an inference as to the complainant’s general disposition; or
- relates to the complainant’s credibility as a witness.

27.56 Generally, leave must not be given under the federal legislation to admit evidence of a child witness or child complainant’s sexual experience unless the evidence is substantially relevant to the facts in issue. In relation to evidence relating to the credibility of a child witness adduced in cross-examination of the child, leave must not be granted unless the evidence has substantial probative value. The court may have regard to a range of factors in deciding whether the evidence has substantial probative value, but must have regard to:

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58  Including an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.
59  Crimes Act 1914 (Cth) s 15VC(2)(a).
60  Ibid s 15YC(2)(b).
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(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.\(^{61}\)

27.57 In addition, the federal legislation provides that sexual experience is not admissible merely because of any inference it may raise about general disposition.\(^{62}\)

27.58 In Victoria, the court must not grant leave unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to a list of considerations.\(^{63}\) One consideration is ‘whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience’.\(^{64}\)

27.59 The admission of sexual history evidence to support an inference that the complainant is ‘the type of person who is more likely to have consented to the sexual activity to which the charge relates’ is prohibited in Victoria.\(^{65}\)

27.60 In addition, s 352 of the Criminal Procedure Act 2009 (Vic) provides that:

   Sexual history evidence is not to be regarded—

   (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or

   (b) as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

27.61 The Queensland, ACT and Northern Territory legislation are substantially similar. The court must not give leave unless satisfied that the evidence has substantial relevance to the facts in issue or is a proper matter for cross-examination about credit.\(^{66}\) Evidence relating to, or tending to establish the fact that, the complainant has engaged in sexual activity with a person or persons is not to be regarded as being a proper matter for cross-examination about credit unless the evidence would be likely materially to impair confidence in the reliability of the complainant’s evidence.\(^{67}\) Sexual activity evidence that relates to or tends to establish that the complainant has engaged, or was accustomed to engaging, in sexual activity is not to be regarded as

\(^{61}\) Ibid s 15YC(4).

\(^{62}\) Ibid s 15YC(3).

\(^{63}\) Criminal Procedure Act 2009 (Vic) s 349.

\(^{64}\) Ibid s 349(a).

\(^{65}\) Ibid s 343.


having a substantial relevance to the facts in issue because of any inference,68 or by reason only of an inference,69 it may raise about general disposition.

27.62 The Western Australian and Tasmanian legislation are alike in so far as they provide that the court shall not grant leave unless the evidence sought to be adduced or elicited has substantial relevance to the facts in issue and the probative value of the evidence that is sought outweighs the distress, humiliation or embarrassment which the complainant must suffer as a result of its admission.70

27.63 The Tasmanian legislation requires the judicial officer to take into account the age of the complainant and the number and nature of the questions likely to be put, when assessing the amount of the distress, humiliation or embarrassment to the complainant.71 It also provides that evidence relating to sexual experience does not have the requisite relevance to a fact in issue if it is relevant only to the credibility of the complainant.72

27.64 In South Australia, leave to ask questions or admit evidence about the complainant’s sexual activities must not be granted unless, taking into account the ‘principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence’, the admission of the evidence is ‘required in the interests of justice’ and is either of ‘substantial probative value’ or ‘would, in the circumstances, be likely materially to impair confidence in the reliability of the evidence of the alleged victim’.73 Evidence the purpose of which is only to raise inferences concerning some general disposition of the complainant, is not admissible.74 The admissibility of sexual experience evidence which relates to the credibility of the complainant is determined by general credibility rules.75

Consultation Paper

27.65 In the Consultation Paper, the Commissions made a number of proposals, substantially based on the current Victorian legislation,76 relating to the federal, state and territory legislative provisions governing the admissibility of sexual experience evidence.

27.66 The Commissions proposed that federal, state and territory legislation should provide that the court shall not grant leave for complainants of sexual assault to be cross-examined about their sexual activities unless it is satisfied that the evidence has

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68 Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(4); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 53(2).
70 Evidence Act 1906 (WA) s 36BC(2); Evidence Act 2001 (Tas) s 194M(2). The Western Australian legislation also prohibits the eliciting or admission of evidence relating to the disposition of the complainant in sexual matters: Evidence Act 1906 (WA) s 36BA.
71 Evidence Act 2001 (Tas) s 194M(4).
72 Ibid s 194M(3).
73 Ibid s 34L(2).
74 Ibid s 34L(3).
75 Ibid s 23.
76 Criminal Procedure Act 2009 (Vic) ss 343, 349, 352.
significant probative value to a fact in issue and the probative value substantially outweighs the danger of unfair prejudice to the proper administration of justice.\footnote{Consultation Paper, Proposal 18–3.}

27.67 The Commissions also proposed that legislation should provide that the court, in deciding whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, must have regard to:

(a) the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;

(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;

(c) the need to respect the complainant’s personal dignity and privacy;

(d) the right of the accused to make a full answer and defence; and

(e) any other factor which the court considers relevant.\footnote{Ibid, Proposal 18–4.}

27.68 The Commissions asked whether federal, state and territory legislation should provide that sexual experience evidence is not:

(a) admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates; and/or

(b) to be regarded as having substantial probative value by virtue of any inference it may raise as to general disposition.\footnote{Ibid, Question 18–4.}

27.69 Finally, the Commissions proposed that federal, state and territory legislation should provide that sexual experience evidence is not to be regarded as being a proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.\footnote{Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence: Improving Legal Frameworks, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 18–5.}

\textbf{Submissions and consultations}

27.70 Stakeholders who addressed the issue agreed generally with the proposals and answered the question about legislative restrictions on the admission of evidence of ‘general disposition’ in the affirmative.\footnote{National Legal Aid, Submission FV 232, 15 July 2010; National Association of Services Against Sexual Violence, Submission FV 195, 25 June 2010; J Stubbs, Submission FV 186, 25 June 2010; Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; Confidential, Submission FV 184, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, Submission FV 149, 25 June 2010; Confidential, Submission FV 136, 21 June 2010; Commissioner for Victims’ Rights (South Australia), Submission FV 111, 9 June 2010.}

27.71 The Public Defenders Office NSW, for example, supported the introduction of a structured discretionary model for the admission of sexual experience evidence.\textsuperscript{82} It considered that the proposal that ‘the court shall not grant leave unless … the evidence has significant probative value to a fact in issue’ adequately deals with the focus of relevance, but that the phrase ‘to a fact in issue’ should be dropped from the proposal because it may cause technical problems. The Public Defenders Office NSW also considered that the primary restriction on the admission of sexual experience evidence\textsuperscript{83} should be redrafted to apply also to evidence that may raise an inference about the complainant’s ‘general disposition’ or the complainant’s credibility as a witness.

27.72 The Law Council of Australia (Law Council) opposed ‘any rigid exclusionary rule that prohibits reasoning in respect of sexual history evidence’ on the basis that, in some circumstances, such evidence is ‘highly probative and it would be unjust for the defence to be prevented from putting such evidence before the tribunal of fact’. The Law Council considered that restricting cross-examination about sexual activities to situations where the evidence’s probative value substantially outweighs the danger of unfair prejudice provides the appropriate test and ‘if that test is satisfied, it is impossible to see any justification for, nonetheless, excluding the evidence’.\textsuperscript{84}

27.73 National Legal Aid observed that ongoing education and professional development of the judiciary and legal practitioners would help to ensure that legislation effectively curtails the distress, humiliation and embarrassment of the complainant due to the admission of irrelevant sexual experience evidence.\textsuperscript{85}

27.74 The Magistrates’ Court and Children’s Court of Victoria commented on the similarities between the proposals and recently enacted Victorian legislation, and noted that the effects of the Victorian reforms are still to be fully assessed.\textsuperscript{86}

\textit{Commissions’ views}

27.75 The Commissions have sought to identify the best formulation of the court’s discretion to admit evidence of the complainant’s sexual experience. Such a formulation should attempt to adequately safeguard complainants against irrelevant and harassing cross-examination, but also uphold the defendant’s right to a fair trial.

27.76 The Consultation Paper proposal on restricting the circumstances in which evidence of a complainant’s sexual experience may be adduced\textsuperscript{87} was based upon s 349 of the \textit{Criminal Procedure Act 2009} (Vic). The Commissions’ proposals are also

\begin{itemize}
\item \textsuperscript{82} Public Defenders Office NSW, \textit{Submission FV 221}, 2 July 2010.
\item \textsuperscript{83} That is, as set out in Consultation Paper, Proposal 18–3.
\item \textsuperscript{85} National Legal Aid, \textit{Submission FV 232}, 15 July 2010.
\item \textsuperscript{86} Magistrates’ Court and the Children’s Court of Victoria, \textit{Submission FV 220}, 1 July 2010.
\item \textsuperscript{87} Consultation Paper, Proposal 18–3.
\end{itemize}
substantially consistent with relevant recommendations of the VLRC’s report, Sexual Offences,88 and the NSWLRC’s report, Reform of Section 409B.89

27.77 In the Commissions’ view, all jurisdictions should enact legislative provisions substantially similar to s 349 of the Criminal Procedure Act 2009 (Vic), and this is reflected in the recommendations set out below—with some changes.

27.78 First, the recommendation, if implemented, would require the evidence to have ‘significant probative value’, rather than ‘substantial relevance to a fact in issue’. The latter formulation appears in the legislation of a number of jurisdictions.90 The term ‘significant probative value’ is more consistent with the overall approach of the uniform Evidence Acts, under which relevance is a threshold test of admissibility91 and there is no concept of ‘substantial’ relevance. The use of ‘significant probative value’ as a test is also consistent with the formulation of other admissibility rules, including those applying to tendency and coincidence evidence,92 and was recommended by the NSWLRC.93

27.79 Secondly, the list of factors that the court must consider to balance the considerations of fairness to the defendant with the need to protect the complainant from distress, humiliation and embarrassment resulting from an invasion of her sexual privacy, should be non-exhaustive. In the Commissions’ view, the listed matters address the main concerns about admitting sexual experience evidence. Others may arise in the particular circumstances of a case, however, and a judicial officer should not be precluded from taking such a relevant matter into account.94

27.80 Finally, the words ‘in the jury’ have been deleted from the reference to evidence that might ‘arouse in the jury discriminatory belief or bias, prejudice, sympathy or

90 Crimes Act 1914 (Cth) s 15Y(2)(a); Criminal Procedure Act 2009 (Vic) s 349; Criminal Law (Sexual Offences) Act 1978 (Qld) s 4; Evidence Act 1906 (WA) s 36BC; Evidence Act 2001 (Tas) s 194M; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 53; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(1).
91 That is, under uniform Evidence Acts ss 55–56.
92 See, eg, uniform Evidence Acts ss 97–98. In the context of those provisions, ‘significant probative value’ has been interpreted to require that evidence be ‘important’ or ‘of consequence’ to the issues. It has been held to mean something more than mere relevance but something less than a ‘substantial’ degree of relevance. For further discussion see: Australian Law Reform Commission, Evidence, (Interim) Report 26, vol 1, [806]; New South Wales Law Reform Commission, Review of Section 409B of the Crimes Act 1900 (NSW), Report 87 (1998), [6.117]; S Odgers, Uniform Evidence Law (8th ed, 2009), [1.3.6680].
94 The VLRC considered that a non-exhaustive list ‘would leave open the possibility that sexual activity evidence could be introduced inappropriately’: Victorian Law Reform Commission, Sexual Offences: Interim Report (2003), [5.58]. In assessing the ‘interests of justice’ of a particular case, judicial officers should be informed not only by the circumstances of the case, but also by the guiding principles and objects clauses of the legislation: see Ch 25.
hostility’. This is consistent with similar provisions in the uniform Evidence Acts, which do not make any distinction between jury and non-jury trials.95

27.81 The recommendation differs from the Consultation Paper proposal in that it follows more closely the Victorian (and South Australian) legislation by requiring the admission of sexual experience evidence to be in ‘the interests of justice’ (having regard to the listed factors). The phrase ‘interests of justice’ is used in a number of evidentiary and procedural provisions, including in the uniform Evidence Acts.96

27.82 The Commissions also recommend that evidence as to the sexual activities of the complainant, other than that to which the charge relates, should not be admissible to show, for example, that the complainant is more likely to have consented to the sexual activity to which the charge relates, because of any inference it may raise about ‘general disposition’. A provision of this nature has been enacted in all Australian jurisdictions except NSW and Tasmania.97 Evidence of prior sexual activity is not normally relevant to the issue of consent, and tendency (or propensity) reasoning in this regard suffers from dangers of reliance on resilient myths and misconceptions about sexual assault complainants.

27.83 In the Commissions’ view, there is no need to make special provision concerning the admissibility of sexual experience evidence for credibility purposes.98 Section 103 of the uniform Evidence Acts already provides that evidence may not be adduced in cross-examination of a witness unless ‘the evidence could substantially affect the assessment of the credibility of a witness’.99 Sexual experience evidence is unlikely to meet this standard.100

Recommendation 27–3 Federal, state and territory legislation should provide that the court must not grant leave under the test proposed in Rec 27–2, unless it is satisfied that the evidence has significant probative value and that it is in the interests of justice to allow the cross-examination or to admit the evidence, after taking into account:


96 See, eg, Commonwealth Evidence Act 1995 (Cth) s 128(4) (‘Privilege in respect of self-incrimination in other proceedings’); Criminal Procedure Act 1986 (NSW), s 306Y (‘Evidence not to be given in the form of recording if contrary to the interests of justice’); Criminal Procedure Act 1986 (NSW) s 29(3) (‘When more than one offence may be heard at the same time’).

97 The Commissions note that the circumstances in which sexual experience evidence may be admitted pursuant to s 293(4) of the Criminal Procedure Act 1986 (NSW) are so narrowly cast that evidence which only raises an inference as to the complainant’s general disposition in sexual matters is likely to be excluded in practice: Criminal Procedure Act 1986 (NSW) s 293(4).

98 As in Victoria under Criminal Procedure Act 2009 (Vic) s 352.

99 Uniform Evidence Acts, s 103(1).

100 S Odgers, Uniform Evidence Law (8th ed, 2009), [1.3.7760]. This constraint does not apply in common law evidence jurisdictions where, as a general rule, questions designed to attack the witness’ credit are permissible in cross-examination of another party’s witness: See Thomson Reuters, The Laws of Australia, vol 16 Evidence, 16.4.
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(1) the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;

(b) the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility;

(c) the need to respect the complainant’s personal privacy;

(d) the right of the defendant to fully answer and defend the charge; and

(e) any other relevant matter.

Recommendation 27–4 Federal, state and territory legislation should provide that evidence about the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, is not of significant probative value only because of any inference it may raise as to the general disposition of the complainant.

Procedural issues

27.84 In all jurisdictions, a determination about the admissibility of evidence of the complainant’s sexual reputation or sexual experience is decided by the court in the absence of the jury. In Victoria, Queensland, the ACT and the Northern Territory, an application for leave may be heard in the absence of the complainant at the defendant’s request. This approach allows for the full examination of the nature and purpose of the proposed evidence by counsel for both sides without causing embarrassment to the complainant and may afford a practical opportunity to limit and frame questions.

27.85 In the Commonwealth, Victorian and ACT jurisdictions, an application for leave is to be made in writing. The Victorian provisions require service of the application on the Office of Public Prosecutions (OPP) or the informant at least seven days before summary hearings, committal hearings and sentencing hearings, and 14 days before trials and special hearings. The written application for leave must set out the initial questions sought to be asked, the scope of the questioning and how the evidence sought

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101 Crimes Act 1914 (Cth) s 15YD(1)(b); Criminal Procedure Act 1986 (NSW) s 293(7); Criminal Procedure Act 2009 (Vic) s 348; Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(6); Evidence Act 1906 (WA) s 36BC(1); Evidence Act 1929 (SA) s 34L(4); Evidence Act 2001 (Tas) s 194M(1)(b); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 52(b); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(4).

102 Criminal Procedure Act 2009 (Vic) s 348; Criminal Law (Sexual Offences) Act 1978 (Qld) s 4(6); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 52(c); Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4(4).


104 Crimes Act 1914 (Cth) s 15YD(1)(b); Criminal Procedure Act 2009 (Vic) s 344; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 52.

105 Criminal Procedure Act 2009 (Vic) s 344.
to be elicited has substantial relevance to the facts in issue or why it is a proper matter for cross-examination as to credit. 106 These procedural controls were imposed after studies showed that the legislation had a limited effect on the admission of prior sexual history evidence. 107

27.86 The Victorian OPP pursued a policy of writing to the defence in sexual offence matters and informing them of the procedural requirements imposed under then s 37A of the Evidence Act 1958 (Vic). 108 As at December 2003, that practice increased the number of written applications for leave, but written applications were still only being made in approximately half of cases where they were required. 109 The VLRC recommended the OPP continue that practice. 110

27.87 There is variation across the jurisdictions as to whether the court is required to record in writing the reasons for granting leave. 111

Consultation Paper

27.88 In the Consultation Paper, the Commissions made a number of proposals relating to the procedure by which an application for leave to admit sexual experience evidence should be made, determined and implemented.

27.89 The Commissions proposed that federal, state and territory legislation should require any application for leave to admit sexual history evidence to be:

(a) made in writing; and

(b) filed with the relevant court and served on the informant or the Director of Public Prosecutions within a prescribed minimum number of days,

and prescribe:

(a) the required contents of such an application;

(b) the circumstances in which leave may be granted out of time;

(c) the circumstances in which the requirement that an application for leave be made in writing may be waived; and

(d) that the application is to be determined in the absence of the jury, and if the accused requests, in the absence of the complainant. 112

27.90 The Commissions also proposed that federal, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave, and if leave is granted, to state the nature of the admissible evidence. 113

106 Ibid s 345.


108 Replaced by Criminal Procedure Act 2009 (Vic) s 348.


110 Ibid, Rec 74.

111 A court may be required to record in writing the reasons for granting leave, eg: Crimes Act 1914 (Cth) s 15YD(2); Criminal Procedure Act 1986 (NSW) s 293(8); Criminal Procedure Act 2009 (Vic) s 351; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 52; or give reasons only, eg: Evidence Act 2001 (Tas) s 194M(5); or may be free of any legislative requirement.

112 Consultation Paper, Proposal 18–6.
Finally, the Commissions proposed that Commonwealth, state and territory Directors of Public Prosecutions (DPPs) should introduce and implement a policy of writing to the defence in sexual assault matters and informing them of the procedural application requirements imposed under the relevant legislation relating to admitting sexual experience evidence.¹¹⁴

**Submissions and consultations**

Some stakeholders, including victims of family violence, supported the Consultation Paper proposals.¹¹⁵

The Public Defenders Office NSW opposed any requirement that written notice be filed in advance and considered that a requirement for the full articulation of reasons for allowing questioning, and for the scope of the questioning to be recorded in writing, would be adequate.¹¹⁶ Other stakeholders noted that it is common for both prosecutors and defence counsel to be briefed on short notice in sexual assault proceedings. Accordingly, there needs to be a degree of flexibility in the process, including to allow applications to be made on short notice.¹¹⁷

The Commonwealth Director of Public Prosecutions (CDPP) opposed the proposal that DPPs should inform the defence of the procedural application requirements, on the basis that this would require the CDPP to provide legal advice to the defence.¹¹⁸ The CDPP considered that the intent of the proposal could be met instead by professional bodies, such as the law societies, creating fact sheets for lawyers on the procedural requirements for admitting and adducing sexual experience evidence in a given jurisdiction.

National Legal Aid and the Magistrates’ Court and Children’s Court of Victoria submitted that it is common for impermissible questions eliciting sexual experience evidence to be asked, without reference to the legislation or legislative procedures.¹¹⁹ National Legal Aid supported monitoring the provisions in practice. The Magistrates’ Court and Children’s Court of Victoria observed that active case management of matters in a specialised sexual assault list improves the ability of the Court to control impermissible questioning and helps ensure that matters are addressed in advance of the hearing.¹²⁰

¹¹⁶ Public Defenders Office NSW, Submission FV 221, 2 July 2010.
¹¹⁷ National Legal Aid, Submission FV 232, 15 July 2010; Barrister, Consultation, Sydney, 10 June 2010.
¹¹⁸ Other stakeholders opposed this aspect of the proposal on similar grounds: National Association of Services Against Sexual Violence, Submission FV 195, 25 June 2010; Northern Territory Legal Aid Commission, Submission FV 122, 16 June 2010.
¹¹⁹ National Legal Aid, Submission FV 232, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Legal Aid NSW, Submission FV 219, 1 July 2010.
¹²⁰ Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
Commissions’ views

27.96 Formalising the procedure by which leave to admit evidence of the complainant’s sexual experience is sought and granted will encourage judicial officers and legal practitioners to turn their minds to the admissibility issues before they arise in the course of proceedings and to help ensure compliance.

27.97 Legislation should require that an application for leave be made in writing and determined in the absence of the jury and, if the defendant so requests, in the absence of the complainant. The court should be required to give reasons for its decision whether or not to grant leave, and, if leave is granted, to state the nature of the admissible evidence. 121 The requirement that the court ‘state the nature of the admissible evidence’ is necessary to prevent questioning of the complainant beyond the scope of the evidence which has been ruled admissible. 122

27.98 These legislative measures should be supported by judicial and practitioner education and training about the procedural requirements for adducing sexual history evidence through cross-examination of the complainant.

Recommendation 27–5  Federal, state and territory legislation should require that an application for leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant must be made:
(a) in writing;
(b) if the proceeding is before a jury—in absence of the jury; and
(c) in the absence of a complainant, if a defendant in the proceeding requests.

Recommendation 27–6  Federal, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant and, if leave is granted, to state the nature of the admissible evidence.

Recommendation 27–7  Australian courts, and judicial education and legal professional bodies should provide education and training about the procedural requirements for admitting and adducing evidence of sexual activity.

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121 A similar recommendation was made in NSWLRC 87: New South Wales Law Reform Commission, Review of Section 409B of the Crimes Act 1900 (NSW), Report 87 (1998), [6.140], Rec 2.
122 Ibid.
Sexual assault communications privilege

27.99 Sexual assault communications are communications made in the course of a confidential relationship between the victim of a sexual assault and a counsellor. The defence may seek access to this material to assist with their preparation for trial and for use during cross-examination of the complainant and other witnesses.

27.100 From the mid-1990s, ongoing reform of sexual assault laws and procedure has included the enactment of legislation to limit the disclosure and use of these communications. Every state and territory—except Queensland—now has specific legislation protecting counselling communications.

27.101 The sexual assault communications privilege has been considered by a number of law reform bodies, including MCCOC, the VLRC, and by the ALRC, VLRC and NSWLRC in ALRC Report 102. These reports have generally taken the view that the privilege serves the important public interest of encouraging people who have been sexually assaulted to seek therapy, and may also encourage people who are sexually assaulted to report the crime to the police.

Current law

27.102 Models of a sexual assault communications privilege differ markedly. Provisions may be formulated either as a privilege or as an immunity. A ‘privilege’ is a right to resist disclosing information that would otherwise be required to be disclosed. An immunity prevents the disclosure of certain information in court proceedings, generally when the public interest in non-disclosure outweighs the public interest in disclosure.

27.103 For example, the NSW provisions operate as a privilege—a person can object to producing a protected confidence on the ground that it is privileged; but the

123 M Heath, The Law of Sexual Offences Against Adults in Australia (2005), prepared for the Australian Institute of Family Studies, 15.
124 For current provisions see: Criminal Procedure Act 1986 (NSW) ch 6 pt 5 div 2; Evidence (Miscellaneous Provisions) Act 1958 (Vic) pt 2 div 2A; Evidence Act 1906 (WA) ss 19A–19M; Evidence Act 1929 (SA) pt 7 div 9; Evidence Act 2001 (Tas) s 127B; Evidence (Miscellaneous Provisions) Act 1991 (ACT) pt 4 div 4.5; Evidence Act 1939 (NT) pt VIA. Some jurisdictions also provide for a ‘professional confidential relationships privilege’ capable of applying to sexual assault counselling communications: Evidence Act 1995 (Cth) ss 126A–126F; Evidence Act 1995 (NSW) ss 126A–126F.
129 For example, common law (and statutory) privileges against self-incrimination, client legal privilege, parliamentary privilege and the privilege in aid of settlement: Australian Law Reform Commission, Making Inquiries: A New Statutory Framework, Report 111 (2009), [3.20].
131 Criminal Procedure Act 1986 (NSW) s 298(1).
primary protected confider (the victim of a sexual assault) can consent to disclosure.\textsuperscript{132} The South Australian provisions are formulated as an immunity, stating that sexual assault communications are ‘protected from disclosure in legal proceedings by public interest immunity’.\textsuperscript{133} The immunity cannot be waived by participants in the protected communication.\textsuperscript{134}

27.104 For simplicity, the discussion below uses the term ‘privilege’ to refer to both models for protecting sexual assault communications from disclosure in court proceedings.

27.105 Other points of divergence are whether the privilege is qualified or absolute; and whether the privilege applies in preliminary criminal proceedings, such as committal proceedings.

27.106 The privilege for communications to sexual assault counsellors under s 127B of the \textit{Evidence Act 2001} (Tas) provides absolute protection for the communications unless the complainant consents to their production.

27.107 In New South Wales,\textsuperscript{135} South Australia,\textsuperscript{136} the ACT\textsuperscript{137} and the Northern Territory,\textsuperscript{138} there is an absolute prohibition against requiring the production of counselling communications in preliminary criminal proceedings and against the use of counselling communication in such proceedings. Otherwise, the privilege that applies in all jurisdictions, except Tasmania, is qualified, both in relation to the production of documents and the use of notes in evidence.\textsuperscript{139}

27.108 One of the main issues relating to the scope of the privilege is that, in many jurisdictions, the current restrictions on admission of sexual assault counselling communications do not prevent a defence lawyer from issuing a subpoena requiring a person to produce counselling notes.\textsuperscript{140} As a result, subpoenas are frequently used to ‘require counsellors to attend and give evidence or produce notes’ and ‘[p]rivate counsellors who are unaware that the law protects confidential counselling communications may produce records, rather than appearing in court to resist a subpoena’.\textsuperscript{141}

27.109 Other factors that affect the scope of the privilege, and which are defined or dealt with inconsistently across the jurisdictions, include:

- the scope of the communications protected;\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item Ibid s 300.
\item \textit{Evidence Act 1929} (SA) s 67E(1).
\item Ibid s 67E(3).
\item \textit{Criminal Procedure Act 1986} (NSW) s 297.
\item \textit{Evidence Act 1929} (SA) s 67F.
\item \textit{Evidence (Miscellaneous Provisions) Act 1991} (ACT) s 57.
\item \textit{Evidence Act 1939} (NT) s 56B.
\item See also, \textit{Evidence (Miscellaneous Provisions) Act 1958} (Vic) s 32C; \textit{Evidence Act 1906} (WA) s 19C.
\item Ibid.
\item See, eg, \textit{Evidence Act 1906} (WA) s 19A, cf \textit{Evidence Act 1929} (SA) s 67D.
\end{enumerate}
\end{footnotesize}
• whether preliminary examination by a judicial officer—to determine questions of leave to produce or adduce protected confidences—is a mandatory or discretionary requirement;\footnote{143}

• the thresholds at which the court must be satisfied before ordering production;\footnote{144}

• the factors the court must take into account for the purposes of the public interest balancing test;\footnote{145} and

• the express exemptions to the privilege.\footnote{146}

\textbf{Further reform of sexual assault communications privilege}

27.110 The harmonisation of sexual assault communications privileges has been considered by SCAG through the National Working Group on Evidence. The Working Group agreed that it is not appropriate to provide for a single model sexual assault counselling protection in Australia because of the ‘satisfactory operation of a variety of protections for sexual assault counselling communications and the variation between jurisdictions in criminal practice and procedure’.\footnote{147}

27.111 Instead, the SCAG Ministers agreed on seven principles (the SCAG principles) to be applied as the minimum standard for protection of sexual assault counselling communications in Australia, if jurisdictions legislate to restrict the disclosure of sexual assault counselling communications in criminal trials.\footnote{148}

27.112 In undertaking this Inquiry, the Terms of Reference instruct the ALRC to be ‘careful not to duplicate … the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions’. For this reason, the focus of the Commissions’ consideration of the sexual assault communications privilege has been on how they operate in practice rather than on the harmonisation of provisions.

27.113 The SCAG principles acknowledge the importance of practical measures that facilitate the implementation of the privilege and its protection. For example, one of the seven principles provides that ‘jurisdictions should consider adapting court processes, with the aim of limiting inadvertent disclosure of sexual assault counselling communications’.\footnote{149}

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\footnote{143}{See, eg, \textit{Criminal Procedure Act 1986 (NSW) s 298(1)(a), cf Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32C(6)}.}

\footnote{144}{See, eg, \textit{Criminal Procedure Act 1986 (NSW) s 298(3),(4), cf Evidence Act 1906 (WA) s 19E}.}

\footnote{145}{See, eg, \textit{Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32D(2) cf Evidence Act 1929 (SA) s 67F(5)–(6)}.}

\footnote{146}{See, eg, \textit{Evidence (Miscellaneous Provisions) Act 1958 (Vic) s 32E cf Evidence Act 1939 (NT) s 56F}.}

\footnote{147}{Australian Government Attorney-General’s Department, \textit{Submission FV 166}, 25 June 2010.}

\footnote{148}{Standing Committee of Attorneys-General, \textit{Communiqué}, 7 May 2010.}

\footnote{149}{Ibid.}
Assisting complainants to invoke the privilege

27.114 As observed during this Inquiry, in practice, the sexual assault communications privilege may not achieve its intended policy objective of protecting the public interest in maintaining the confidentiality of the counselling relationship and its therapeutic benefits.  

27.115 In 2009, Women’s Legal Services NSW coordinated a project providing pro bono representation to sexual assault victims seeking to maintain privilege over their counselling and medical records. The Sexual Assault Communications Pro Bono Referral Pilot Project in the Downing Centre (SACP Pilot)—a New South Wales Local Court—involves the NSW Bar Association, the Office of the Director of Public Prosecutions NSW (NSW ODPP) and three private commercial law firms. The project aimed to provide a ‘stop-gap’ measure for legal service provision, investigate the operation of the privilege, and identify areas in need of legislative and procedural reform.  

27.116 Women’s Legal Services NSW has identified the following continuing problems for victims of sexual assault and counsellors pursuant to existing sexual assault communications privilege provisions:

- some counselling services do not inform sexual assault victims that their counselling notes have been subpoenaed;
- some counselling services produce material to the court without raising an objection or claiming the privilege;
- some counselling services give sexual assault victims inaccurate advice about the privilege;
- sexual assault victims may not receive written notice of the subpoenaed documents;
- sexual assault victims have difficulty obtaining legal assistance to uphold their privilege;
- sexual assault victims who seek to uphold their privilege often require legal representation at short notice, and the legal representation retained may only gain limited access to relevant materials;
- judicial officers permit reliance on improperly obtained confidences to support arguments about admissibility;
- the party seeking access to protected confidences may re-ventilate arguments about admissibility before trial judges—after a judicial officer presiding at an interlocutory hearing has made a ruling—and trial judges may overrule the decision;

150 Women’s Legal Services NSW, Consultation, Sydney, 20 January 2010.
151 Women’s Legal Services NSW, Submission FV 182, 25 June 2010. At the time of writing, an evaluation report for the SACP Pilot was being prepared by Women’s Legal Services NSW.
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- sexual assault victims have reported feelings of violation due to the legal processes associated with seeking disclosure of their counselling records and seeking to uphold their privilege.\textsuperscript{152}

27.117 Many of these problems appear to arise because, while the privilege is legally that of the participants in the counselling process,\textsuperscript{153} the privileged documents sought to be produced and admitted belong to counselling services or individual counsellors responsible for their creation whose attitude to disclosure may differ from that of the victim because of the different professional and privacy interests at stake.

27.118 A qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the complainant.\textsuperscript{154} However, sexual assault victims, who are unrepresented in criminal proceedings, may not be in a position to claim or seek to enforce the privilege.

27.119 This difficulty has generated debate about whether victim advocates should be employed in the criminal justice process to make submissions as to rulings on the sexual assault communications privilege.\textsuperscript{155} It is beyond the scope of the current Inquiry to consider that debate, which would require detailed consideration of difficulties inherent in reconciling the role of a separate legal representative with the current constraints of the adversarial system.\textsuperscript{156}

27.120 Complainants, whether represented or unrepresented, may be assisted to invoke the sexual assault communications privilege by implementing some or all of the following measures:\textsuperscript{157}

- requiring the party seeking production to provide notice in writing to each other party and if the sexual assault complainant is not a party—the sexual assault complainant;
- requiring that any such written notice issued be accompanied by a pro forma fact sheet on the privilege and providing contact details for assistance;

\textsuperscript{152} Women’s Legal Services NSW, Consultation, Sydney, 20 January 2010.
\textsuperscript{153} For example, as the ‘protected confider’ who made the ‘counselling communication’: Criminal Procedure Act 1986 (NSW) ss 295, 296. This may include the sexual assault victim, the person who provides the counselling service, and those present to facilitate the counselling process, such as a non-offending parent.
\textsuperscript{155} See, eg, Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), Responding to Sexual Assault: The Way Forward (2005), 179–180.
\textsuperscript{156} The NSW Criminal Justice Sexual Offences Taskforce observed that while ‘there may be some merit to utilising independent legal representation in matters arising under the sexual assault communications privilege, as this is a privilege that belongs to the complainant, the proposal, as it currently stands, appears to create more problems than it may solve’: Ibid, 180.
\textsuperscript{157} These proposed practices reflect the views of Women’s Legal Services NSW as contained in: Women’s Legal Services NSW, The NSW Sexual Assault Communications Privilege: Current Procedure and Issues for Reform: Submission to the NSW Attorney-General’s Department (2008).
• educating defence counsel about their obligation to identify records potentially giving rise to the privilege to encourage compliance with any such written notice provisions;

• providing counsellors with education about the sexual assault communications privilege and next steps if they are served with a subpoena;¹⁵⁸

• requiring that subpoenas be issued with a pro forma fact sheet on the privilege, providing contact details for legal assistance;

• improving access to free legal assistance about the sexual assault communications privilege;

• requiring that the court issuing a subpoena provide a copy of all subpoenas to the prosecution;

• educating prosecutors: to identify possible claims of the sexual assault communications privilege arising out of subpoenas; to inform the court of any such possible claims of the sexual assault communications privilege during pre-trial processes; where subpoenas are served at short notice during a trial, to query short service applications; to inform the court where documents containing protected confidences are improperly adduced, admitted or used in the course of proceedings;

• educating defence counsel generally about the sexual assault communications privilege with a view to limiting the use of improperly obtained protected confidences; and

• educating judicial officers about the impact of sexual assault on complainants, the role of counselling in alleviating victims’ trauma and the desirability of encouraging people who have been sexually assaulted to seek therapy.

Submissions and consultations

27.121 In the Consultation Paper, the Commissions asked what procedures and services would best assist sexual assault complainants to invoke the sexual assault communications privilege, assuming they continue to be unrepresented in sexual assault proceedings.¹⁵⁹

27.122 Some stakeholders expressed support for the adoption of the measures raised in the Consultation Paper to assist sexual assault complainants to invoke the sexual assault communications privilege.¹⁶⁰

27.123 The NSW ODPP submitted that the counselling communications privilege has not had adequate attention paid to it by participants in the criminal justice system in

¹⁵⁹ Consultation Paper, Question 18–5.
NSW—including the courts, legal practitioners, counsellors, medical practitioners and organisations holding personal records. The NSW ODPP noted that the absolute prohibition on the production of a document recording a protected confidence in committal proceedings is not respected in practice. Rather, subpoenas are regularly issued and documents produced, often without the knowledge of the prosecution.

27.124 The NSW ODPP stated that complainants involved in the SACP Pilot gave ‘very positive’ feedback about the assistance they had received. The ODPP considers that the SACP Pilot has increased awareness of the privilege and the complainant’s rights and that legal assistance should be available to complainants either through a community victim’s advocacy service or the relevant legal aid commission. The NSW ODPP identified a number of problems with the sexual assault communications privilege, some of which were also identified by other stakeholders.

27.125 First, the prosecutor’s role in regard to privileged material was observed to be problematic because of the potential for conflict with the prosecutor’s obligations of disclosure. The NSW ODPP considered that it is inappropriate for the prosecutor to vet material, advise the complainant and argue the privilege, although the prosecutor should be present for any argument to assist the court.

27.126 Secondly, the subpoena of counselling records puts complainants at risk of having their place of residence, contact information and other personal details disclosed to the court and others without appropriate vetting.

27.127 Thirdly, the NSW ODPP observed that victims of family violence are particularly susceptible to the subpoena of counselling records because the offender’s knowledge of the victim enables them to identify potential sources of personal information. This can result in the issuing of multiple subpoenas, which can be perceived as an attempt to intimidate the victim.

27.128 Fourthly, late notice of the return date of a subpoena was a consistent problem encountered by the SACP Pilot and presented particular problems when this date was close to the scheduled trial date. In some instances, the complainant must choose between proceeding with the trial or claiming the privilege.

27.129 The NSW ODPP suggested that:

- stringent procedures need to be adopted and adhered to by the Court in regard to subpoenas;

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162 The DPP NSW noted that one District Court Judge, on hearing an argument for privilege, observed: ‘again nobody paid any attention to the legislation and access was granted to those records [of a psychiatrist treating a complainant as a result of an assault] which is precisely the situation that the legislation is designed to avoid’: Ibid.
163 Women’s Legal Service Queensland similarly noted that the involvement of prosecutors in a claim for the privilege is limited: Women’s Legal Service Queensland, Submission FV 185, 25 June 2010.
164 This concern was also expressed by a victim of family violence who related their experience with the subpoenaing of counselling records during court proceedings: Confidential, Submission FV 14, 5 November 2009.
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- where counselling notes are subpoenaed, there should be mandatory notification of the ‘other party’, so that, for instance, the prosecution has the opportunity to ask that access is not granted until such time as the complainant has been notified; and

- consideration should be given to introducing provisions to ensure that subpoenas are issued in a timely way.166

27.130 The Magistrates’ Court and Children’s Court of Victoria observed that the application of the privilege to civil proceedings, which may be related to criminal proceedings, has prevented ‘backdoor’ impermissible access to confidential communications. In the Courts’ experience, difficulties with the operation of the privilege in practice arise more commonly where access is sought from individual health professionals, as opposed to sexual assault-specific service providers. Centres Against Sexual Assault (CASA) are often represented and the complainant’s views are put before the court either by the prosecution or by the CASA.

27.131 The Courts observed that particular difficulties arise where access is sought to departmental records, particularly where child protection issues arise in relation to the complainant. The Courts suggested that it may be appropriate to require human services departments to categorise their material and be legally represented in relation to any subpoenas to which the department is required to respond.

27.132 The Courts expressed support for an approach that ensures that all stakeholders’ legitimate interests are put before the court and that minimises the potential for the subpoena of counselling records to operate as a ‘fishing exercise’.167

27.133 Other stakeholders also expressed views about how to improve the operation of the privilege in practice for sexual assault complainants. For example, the Women’s Legal Service Queensland supported the development of processes to better enable unrepresented people to assert the privilege.168 The National Association of Services Against Sexual Violence (NASASV) suggested that measures should target third parties who hold confidential records to ensure that they are informed about the communications privilege.169 The Canberra Rape Crisis Centre supported absolute protection of communications unless the complainant consents to their production.170

Commissions’ views

27.134 The SCAG National Working Group on Evidence found that the varying models for protecting the confidentiality of sexual assault counselling communications are operating satisfactorily.171 The Commissions are, however, unconvinced by this conclusion.

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166 Ibid.  
167 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.  
170 Canberra Rape Crisis Centre, Submission FV 172, 25 June 2010.  
27.135 While the SCAG principles may assist in harmonising legislative provisions, the Commissions consider that the principles do not deal adequately with the fundamental cause of difficulties with the operation of the privilege in practice identified by stakeholders in this Inquiry. That is, while the privilege is legally that of the participants in the counselling process, the documents subject to the privilege belong to counselling services or individual counsellors responsible for their creation, and it is to these parties that subpoenas will be directed. Counsellors may have professional and therapeutic reasons to oppose disclosure, but these interests may differ from the privacy and other interests of the complainant. Moreover, counsellors are not always aware of their rights and responsibilities in relation to subpoenas issued for the production of counselling communications concerning complainants.

27.136 In the Commissions’ view, more needs to be done to ensure that existing legislative provisions operate effectively to protect counselling communications. In particular, steps should be taken to ensure that complainants are notified, in a timely manner, about the subpoena of counselling communications and given information about their legal rights and options for accessing legal advice. In this context, SCAG Principle 4 states that jurisdictions ‘should consider adapting court processes, with the aim of limiting inadvertent disclosure of sexual assault counselling communications’.

27.137 The Commissions recommend that federal, state and territory legislation relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance;
- that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

27.138 Education and training to improve awareness about the existence of the privilege and how it may be asserted would also assist in this regard. Bodies such as the Law Council and NASASV (the peak body for organisations who work with victims of sexual violence) may be appropriate bodies to pursue such an initiative. Judicial officers may also benefit from greater awareness of the privilege and how it may be asserted.

27.139 The release of the evaluation of the SACP Pilot may provide an opportunity for consideration by governments and law reform bodies of other measures that might be taken to improve the operation of the sexual assault communications privilege.

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172 The sexual assault victim who is counselled, the person who provides the counselling service and those present to facilitate the counselling process, such as a parent.

173 Standing Committee of Attorneys-General, Communiqué, 7 May 2010, 10.
Federal, state and territory legislation and court rules relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

(a) parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;

(b) that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance; and

(c) that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

The Australian, state and territory governments, in association with relevant non-government organisations, should work together to develop and administer training and education programs for judicial officers, legal practitioners and counsellors about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications.

There is a considerable body of research that shows that jurors and jury-eligible citizens hold a number of misconceptions about children’s ability to give truthful evidence and how children react to sexual abuse. It is said that the most common misconceptions, which apply equally in contexts of family violence, include:

- children are easily manipulated into giving false reports of sexual abuse;
- child sexual abuse will result in physical damage and evidence;
- a typical victim would resist, cry out for help or escape the offender;
- delay in complaint is uncommon and such a delay is evidence of lying; and
- inconsistencies in a child’s report is evidence of lying.

An extensive summary of the literature on jurors’ and laypersons’ misconceptions can be found in A Cossins, ‘Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us’ (2008) 15 Psychiatry, Psychology and Law 153.

27.141 The key question posed by the literature on jurors’ and laypeople’s misconceptions about child sexual abuse is whether expert witnesses are needed in child sexual assault trials ‘to educate jurors about children’s memory, suggestibility, and reactions to abuse’.\textsuperscript{176}

27.142 Compared to the United States, Australian jurisdictions have had limited experience with admitting expert witness evidence about children. The general approach under the common law opinion rule ‘has been to exclude such evidence on the grounds that the behaviour of child sexual abuse victims is within the common knowledge or ordinary experience of the jury’.\textsuperscript{177}

27.143 However, many professionals recognise that some of the responses of children to sexual abuse are counterintuitive from a layperson’s perspective, such as delay in complaint, secrecy, protecting the offender and maintaining an emotional bond with the offender.\textsuperscript{178} Rather than the jury relying on its commonsense or collective experience, it is arguable that expert testimony about the behaviour of sexually abused children is necessary ‘to restore a complainant’s credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance’,\textsuperscript{179} especially where the behaviour in question appears to a jury to be inconsistent with sexual abuse.

**Reform of the opinion rule**

27.144 There has been a consistent view that legislative reform is needed to allow the admissibility of expert opinion evidence on the behavioural patterns of sexually abused children and children generally.\textsuperscript{180} The first jurisdiction in Australia to legislate to overcome the limitations of the common law opinion rule was Tasmania. In 2001, a specific provision dealing with the admission of expert witness evidence in child sexual assault trials was included when Tasmania enacted the *Evidence Act 2001* (Tas).\textsuperscript{181}

\begin{footnotesize}
\begin{enumerate}
\item *Evidence Act 2001* (Tas) s 79A. The Tasmanian Act does not include a provision that permits the admissibility of such evidence as an exception to the credibility rule, as is the case under the
\end{enumerate}
\end{footnotesize}
In ALRC Report 102, the ALRC, NSWLRC and VLRC noted wide support for amending the common law opinion rule to allow the admission of expert opinion evidence about children. The report highlighted the main problem with admitting expert opinion evidence about the development and behaviour of children—that is, if tendered for a credibility purpose, the credibility rule as well as exceptions to the credibility rule, are obstacles to admission. For this reason, the ALRC, NSWLRC and VLRC made recommendations to amend s 79 of the uniform Evidence Acts to facilitate the admission of such evidence and to introduce a new exception to the credibility rule.

These amendments were subsequently adopted by the Commonwealth, NSW and Victoria. Section 79(2) of the uniform Evidence Acts confirms that for the purposes of the expert opinion exception to the opinion rule, ‘specialised knowledge’ includes ‘specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)’. Section 108C of the uniform Evidence Acts provides that the credibility rule does not apply to evidence given by a person concerning the credibility of another witness if the person has specialised knowledge based on the person’s training, study or experience (including specialised knowledge of child development and child behaviour) and the evidence ‘could substantially affect the assessment of the credibility of a witness’.

In 2008, Western Australia enacted provisions dealing with the opinion evidence of experts on child behaviour in child sexual offence proceedings in the Evidence Act 1906 (WA). This states that evidence by such an expert about ‘child development and behaviour generally’, or ‘child development and behaviour in cases where children have been the victims of sexual offences’, that is relevant is admissible notwithstanding certain other rules of evidence.

Dr Anne Cossins has suggested, however, that the amendments to the uniform Evidence Acts ‘are a gateway only, rather than a complete answer to the problem of correcting juror misconceptions’. First, the gateway represented by s 108C is narrow, because the expert opinion evidence has to ‘substantially affect the assessment of the credibility of the complainant in a child sexual assault trial. This may represent a relatively high bar and impose ‘a significant limitation on the admissibility


Ibid, [9.147].

Ibid, Recs 9–1, 12–7.

Evidence Amendment Act 2008 (Cth); Evidence Amendment Act 2007 (NSW); Evidence Act 2008 (Vic).

At the time of writing, Tasmania had not adopted these amendments.

Evidence Act 1995 (Cth) s 79(2); Evidence Act 1995 (NSW) s 79(2); Evidence Act 2008 (Vic) s 79(2).

Evidence Act 1906 (WA) s 36BE.

of expert evidence admitted solely for its credibility purpose. Secondly, expert opinion evidence can only be admitted with the leave of the court, which means that the court will need to refer to the matters listed in s 192 of the uniform Evidence Acts before giving leave—and consider any defence counsel objections about unfairness to the accused and lengthening of the trial.

27.149 In addition, while expert opinion evidence on children’s credibility may be desirable, those seeking to adduce such evidence face practical difficulties with the cost and availability of experts. Crown prosecutors have noted that it may not be possible to call expert witnesses to give evidence, because such witnesses are not available or because there is no such expert in a particular jurisdiction. For some prosecutors, it may be too costly to fly an expert from interstate. Even if expert opinion evidence is admitted, some experts may take a ‘hired gun approach’ to the literature and selectively choose research or misinterpret research to illustrate a particular point.

27.150 While the uniform Evidence Acts reforms were an attempt to address one of the barriers to prosecuting child sex offences, the provisions may be insufficient to address the problem of jurors’ misconceptions in child sexual assault trials.

Reform options

27.151 A number of options for further reform of the operation of the opinion rule with respect to expert evidence in child sexual assault trials have been canvassed. Barriers to the admission of such evidence could be lowered, for example, by:

- removing the word, ‘substantially’, from s108C(1)(b)(ii) of the uniform Evidence Acts; or
- making some categories of expert opinion evidence admissible without leave of the courts, as currently required.

27.152 The National Child Sexual Assault Reform Committee has suggested that, because the prosecution may be unable to lead evidence from an expert witness about children’s responses to sexual abuse and their reliability as witnesses, or a trial judge may refuse to give leave for such evidence to be admitted, a mandatory judicial direction, containing the same information that would be given by an expert witness, should be introduced into all Australian jurisdictions. This would counteract juror misconceptions and serve as an alternative to calling expert witnesses.

27.153 On one view, it is clearly to the defendant’s advantage for expert evidence not to be admitted in a child sexual assault trial, because this allows the defence to

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190 Ibid, 166.
192 The National Child Sexual Assault Reform Committee was formed in 2000 and comprises Directors of Public Prosecutions, judges, Children’s Commissioners, academics, legal aid representatives, senior police officers, crime commissioners and others.
exploit all the misconceptions associated with delay in complaint, behavioural
disturbances and counterintuitive behaviour.\textsuperscript{194} As it is likely that defence counsel will
seek to have expert opinion evidence about the behaviour of sexually abused children
declared inadmissible or excluded on the grounds that it is prejudicial or within the
common knowledge of the jury, it may be more appropriate for a mandatory judicial
direction to be given by the judge at the end of the trial.\textsuperscript{195}

27.154 New Zealand provides an example of the type of instructions judges are
required to give when a witness is a child under the age of six years of age, under reg 49 of the \textit{Evidence Regulations 2007} (NZ):

\begin{quote}
If, in a criminal proceeding tried with a jury in which a witness is a child under the
age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction
about the evidence of very young children and how the jury should assess that
evidence, the Judge may give the jury a direction to the following effect:

(a) even very young children can accurately remember and report things that have
happened to them in the past, but because of developmental differences,
children may not report their memories in the same manner or to the same
extent as an adult would:

(b) this does not mean that a child witness is any more or less reliable than an
adult witness:

(c) one difference is that very young children typically say very little without
some help to focus on the events in question:

(d) another difference is that, depending on how they are questioned, very young
children can be more open to suggestion than other children or adults:

(e) the reliability of the evidence of very young children depends on the way they
are questioned, and it is important, when deciding how much weight to give to
their evidence, to distinguish between open questions aimed at obtaining
answers from children in their own words from leading questions that may put
words into their mouths.
\end{quote}

27.155 The National Child Sexual Assault Reform Committee has recommended
three similar draft mandatory directions that summarise the findings in the
psychological literature about children’s memory, their reliability as witnesses, their
resistance to suggestions of abuse and the importance of examining the way a child is
questioned when deciding how much weight to give their evidence.\textsuperscript{196}

\textit{Consultation Paper}

27.156 The Consultation Paper proposed that state and territory evidence legislation
should provide that: the opinion rule does not apply to evidence of an opinion of a

\textsuperscript{194} S Blackwell, ‘Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand’ (Paper
presented at The Children and the Courts Conference, Canberra, 5 November 2005).

\textsuperscript{195} See A Cossins, J Goodman-Delahunty and K O’Brien, ‘Countering Misconceptions in Child Sexual
Assault Cases with Expert Evidence and Judicial Directions’ (Paper presented at Australian and New

\textsuperscript{196} All three recommendations address the typical juror misconceptions that have been identified in the
literature: see A Cossins, \textit{Alternative Models for Prosecuting Child Sex Offences in Australia} (2010),
prepared for the National Child Sexual Assault Reform Committee, 233–235.
27. Evidence in Sexual Assault Proceedings

27.157 The Consultation Paper also asked whether federal, state and territory legislation should provide for mandatory jury directions, containing prescribed information about children’s abilities as witnesses or children’s responses to sexual abuse, along the lines of the New Zealand model described above.

Submissions and consultations

27.158 There were few comments on the Consultation Paper proposal. This is not surprising, as the proposal is consistent with the approach already taken in uniform Evidence Acts jurisdictions and the parallel approach in Western Australia.

27.159 Women’s Legal Services NSW supported the proposal, but expressed general concerns that using expert opinion on the development and behaviour of sexually abused children may lead to problems—as such evidence about children who have been sexually abused may be used as much to attack children as to bolster their credibility.

27.160 There was some support in submissions and consultations for the use of jury directions about children’s abilities as witnesses or children’s responses to sexual abuse. The NSW ODPP, for example, stated that it is ‘necessary to take further action to dispel outdated myths and preconceived notions about children and their evidence’—particularly in respect of very young children.

27.161 Stakeholders also noted the need to keep the content of such directions consistent with current knowledge. Jury directions need to be ‘based on sound understanding of child behavioural psychology’ and ‘reviewed over time to ensure they reflect current thinking’.

Commissions’ views

27.162 There is recognition that, in at least some cases, expert evidence on the development and behaviour of children generally (and those who have been victims of sexual offences in particular) and the implications for the credibility of children as
witnesses may be desirable.\textsuperscript{204} As noted in the Bench Book for Children Giving Evidence in Australian Courts:

It would appear that courts in the past have overestimated the knowledge and capabilities of jurors in this context and underestimated the usefulness of expert evidence in child sexual abuse cases.\textsuperscript{205}

27.163 On this basis, whatever the problems in practice, the approach to the admissibility of such evidence taken under the uniform Evidence Acts is clearly an improvement on the position in jurisdictions that have not joined the scheme. For this reason, the Commissions recommend that state and territory evidence legislation should provide that (a) the opinion rule does not apply to evidence of an opinion of a person based on that person’s specialised knowledge of child development and child behaviour; and (b) the credibility rule does not apply to such evidence given concerning the credibility of children.

27.164 The intention of this proposal is that all states and territories that have not already done so should adopt provisions consistent with ss 79 and 108C of the uniform Evidence Acts. The Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme. Alternatively, reforms in the area of expert opinion evidence could be enacted in evidentiary provisions outside the uniform Evidence Acts—as in the \textit{Evidence Act 1906} (WA), which already contains modification of common law rules specific to evidence by an expert on the subject of child behaviour.\textsuperscript{206}

27.165 Another, complementary, approach would be to encourage the use of appropriate jury directions about children’s abilities as witnesses. In the light of research that shows that jurors hold a number of misconceptions about children’s ability to give truthful evidence and how children react to sexual abuse, there is a strong case for the use of jury directions when children give evidence in sexual assault proceedings. Such a jury direction would essentially summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour.

27.166 As the law currently stands, however, it is not permissible for a judge to give such directions to the jury, because the subject matter is not a matter for ‘judicial notice’.\textsuperscript{207} The Commissions, therefore, recommend that legislation authorise the


\textsuperscript{205} Australasian Institute of Judicial Administration, \textit{Bench Book for Children Giving Evidence in Australian Courts} (2009), 26.

\textsuperscript{206} \textit{Evidence Act 1906} (WA) s 36BE. See also \textit{Evidence Act 1906} (WA) s 106H, modifying the hearsay rule with respect to children’s statements. \textit{Evidence Act 1977} (Qld) s 9C provides for expert evidence to be admitted about a child witness’s ability to give evidence.

\textsuperscript{207} See \textit{Bullock v The Queen} [2010] 5 NTCCA, [11]–[17].
giving of jury directions about children’s abilities as witnesses and responses to sexual abuse—including in a family violence context.

27.167 It has not been possible, in the context of this Inquiry, to develop recommendations on any particular form of jury direction, or guidance on when such a direction should be given. The Commissions recommend that model directions should be developed by judges, through an appropriate body such as the National Judicial College of Australia, and drawing on the expertise of relevant professional and research bodies—such as the Australian Institute of Criminology and the Australian Centre for the Study of Sexual Assault.

27.168 Model directions might also be incorporated in bench books for judicial officers dealing with sexual assault cases.\textsuperscript{208} For example, the Australasian Institute of Judicial Administration \textit{Bench Book for Children Giving Evidence in Australian Courts} contains comprehensive information for judicial officers on matters such as assessing the credibility of children as witnesses, judicial assumptions about child witnesses, jury misconceptions about children and child abuse.\textsuperscript{209}

27.169 Finally, stakeholders also expressed some concerns about how adducing expert opinion evidence in child sexual assault cases works in practice.\textsuperscript{210} The Commissions note that problems with costs or delay attributable to adducing expert opinion evidence and undue partisanship or bias on the part of expert witnesses are not limited to those arising in sexual assault proceedings. These problems have been widely discussed in law reform reports\textsuperscript{211} and are not the subject of recommendations in this Inquiry.

\textbf{Recommendation 27–10} State and territory evidence legislation should provide that:

(a) the opinion rule does not apply to evidence of an opinion of a person based on that person’s specialised knowledge of child development and child behaviour; and

(b) the credibility rule does not apply to such evidence concerning the credibility of children.


\textsuperscript{209} Australasian Institute of Judicial Administration, \textit{Bench Book for Children Giving Evidence in Australian Courts} (2009).

\textsuperscript{210} For example, Women’s Legal Services NSW, \textit{Submission FV 182}, 25 June 2010; Office of the Director of Public Prosecutions (WA), \textit{Consultation}, Perth, 201.

**Recommendation 27–11** Federal, state and territory legislation should authorise the giving of jury directions about children’s abilities as witnesses and responses to sexual abuse, including in a family violence context.

**Recommendation 27–12** Judges should develop model jury directions, drawing on the expertise of relevant professional and research bodies, about children’s abilities as witnesses and responses to sexual abuse, including in a family violence context.

### Tendency and coincidence evidence

27.170 The following section discusses aspects of the law of evidence concerning the admissibility of ‘tendency’ and ‘coincidence’ evidence, as defined under the uniform Evidence Acts, and ‘propensity’ or ‘similar fact’ evidence at common law. These forms of evidence may include, significantly, the evidence of other complainants who have allegedly been sexually assaulted by the same defendant.

27.171 For example, evidence may be adduced to show that, because the defendant engaged in sexual activity with one child in his or her family, the defendant has a tendency to commit such acts. This evidence may have probative value in relation to allegations of sexual assault against other children in the family. Similarly, evidence may be adduced to show that a defendant engaged in sexual activity with two children in similar circumstances—for example, when another parent was absent. The evidence about one allegation may have probative value in relation to the other because it is improbable that the events were coincidental.

27.172 Tendency and coincidence evidence may also include, for example, evidence of prior convictions for sexual offences or other prior illegal sexual conduct—often referred to as ‘uncharged acts’—such as ‘grooming’ behaviours.

### Current law

27.173 Under the uniform Evidence Acts—applicable in NSW, Victoria, Tasmania and the ACT—evidence about a defendant’s prior illegal sexual conduct may be characterised as ‘tendency’ or ‘coincidence’ evidence.\(^{212}\)

27.174 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 the 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’.\(^{213}\)

27.175 Coincidence evidence is evidence that ‘2 or more events occurred’ that is adduced to prove that ‘a person did a particular act or had a particular state of mind on

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213 Ibid s 97.
the basis that, having regard to any similarities in the events … it is improbable that the
events occurred coincidentally’.

27.176 The test for admissibility under the uniform Evidence Acts is whether the
tendency or coincidence evidence has significant probative value which substantially
outweighs any prejudicial effect it may have on the defendant.

27.177 At common law, evidence of these kinds is referred to as either ‘propensity’
or ‘similar fact’ evidence, depending on the purpose for which it is admitted. In
jurisdictions that do not apply the uniform Evidence Acts, the admissibility of these
forms of evidence is governed by the common law, as modified by statute in some
jurisdictions.

27.178 At common law, as a matter of general principle, evidence of past criminal
conduct, including convictions (for sexual offences or otherwise) is not admissible
unless there is a ‘striking similarity’ or ‘underlying unity’ between the similar facts.
Admissibility is governed by the test in Pfennig v The Queen—that is, propensity or
similar fact evidence is admissible if its probative value is such that there is no rational
view of the evidence that is consistent with the innocence of the accused.

27.179 Some common law evidence jurisdictions have enacted legislative provisions
modifying common law rules relating to propensity or similar fact evidence:

- in Queensland, similar fact evidence 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’;

- in Western Australia, the Evidence Act 1906 (WA) governs the admissibility of
propensity evidence by incorporating a ‘significant probative value’ test and a
public interest test;

- in South Australia, propensity evidence relating to a count of sexual assault is
only admissible in a joint trial if it has relevance beyond mere propensity.
However, in deciding admissibility, the judicial officer is not to have regard to
‘whether or not there is a reasonable explanation in relation to the evidence
consistent with the innocence of the accused or whether or not the evidence may
be the result of collusion or concoction’.

Impact in sexual assault proceedings

27.180 The impact of these rules of evidence depends on the type of trial and the
type of evidence the prosecution seeks to adduce. If there are two or more
complainants who have allegedly been sexually assaulted by the same defendant—for

214 Ibid s 98.
217 Ibid, 485; see also HML v The Queen (2008) 235 CLR 334.
218 Evidence Act 1977 (Qld) s 132A.
219 Evidence Act 1906 (WA) s 31A(2).
220 Criminal Law Consolidation Act 1935 (SA) s 278(2a).
example, two daughters of the defendant, the prosecution will often make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. As discussed in Chapter 26, the threshold question for holding a joint trial is whether each complainant’s evidence will be cross-admissible in respect of the charges involving the other complainant or complainants.

27.181 If there is only one complainant, the prosecution may have evidence from other witnesses about the defendant’s criminal sexual behaviour with them. Alternatively, it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, and the context in which the sexual assault occurred.\footnote{221}{Relationship evidence is discussed later in this chapter.}

27.182 Three aspects of the law of evidence concerning the admissibility of tendency and coincidence evidence are problematic in sexual assault cases. These are:

- the ‘striking similarities’ test;
- the ‘no rational view of the evidence’ test; and
- excluding ‘a reasonable possibility of concoction’.

**The ‘striking similarities’ test**

27.183 At common law, the cross-admissibility of the evidence of two or more complainants is, at the outset, dependent on the evidence revealing ‘striking similarities’.\footnote{222}{Phillips v The Queen (2006) 225 CLR 303.} The cross-admissibility of evidence frequently arises in the child sexual assault context where it has been argued that the ‘striking similarities’ test ‘has been used to create artificial distinctions in relation to sex offender behaviour’.\footnote{223}{A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 202.}

27.184 This artificiality is said to arise because ‘when it comes to assessing the probative value of the evidence of child complainants, there will be higher or lower degrees of similarity depending on what a judge knows about sex offending behaviour’.\footnote{224}{Ibid.} For example, a trial judge who is unaware of the range of grooming and sexual practices of child sex offenders ‘may look for greater degrees of similarity in the evidence compared to a judge who is aware of the variety of ways in which … offenders gain a child’s trust and affection and the different sexual practices a serial offender will engage in’.\footnote{225}{Ibid.}

27.185 A lower threshold for determining probative value may be ‘appropriate in child sexual assault cases where the identity of the offender is not in issue, in order to capture the range of sexual and grooming behaviours of serial offenders’.\footnote{226}{Ibid.} Since most cases of sexual assault, especially in a family violence context, involve defendants known to the complainant, rather than strangers, the identity of the accused will not...
usually be a fact in issue. It is also argued that, when applying the ‘striking similarities’ test, many cases have failed to recognise that any sexual practices with children ‘ought to be the sufficient similarity requirement since sex offenders will engage in different sexual conduct with different children depending upon the age and sex of the child, the passivity or resistance of the child, the degree of grooming of, and the degree of access to, the child, the defendant’s relationship with the child and so on.’

27.186 Cases such as R v KP; Ex parte Attorney-General (Qld)—which involved evidence of sexual assaults against two brothers by a school music teacher and friend of the family (and against two of the defendant’s own children)—illustrate how rules on the admissibility of propensity and similar fact evidence can frustrate legislative attempts to increase the number of joint trials. This is because a decision to hold a joint trial is dependent on the cross-admissibility of each complainant’s evidence which, in turn, is dependent on finding sufficient similarities in the evidence. Recently, the culmination of the tension between cross-admissibility and joint or separate trials occurred in the High Court case of Phillips v The Queen. Since this decision, the applicability of the ‘striking similarities’ test has been reinforced as the standard for determining the admissibility of similar fact evidence at common law.

27.187 Although the uniform Evidence Acts create a different regime for admitting tendency and coincidence evidence, it has been argued that the striking similarities test is still used in assessing the probative value of the evidence of two or more complainants about a defendant’s sexual conduct. For example, the NSW Court of Criminal Appeal has noted the similarity between the approach under the Evidence Act 1995 (NSW) and the common law. Common law formulations, including ‘striking similarities’ have been held to ‘guide’ the reasoning process when determining whether tendency or coincidence evidence has significant probative value under ss 97 and 98 of the uniform Evidence Acts.

The ‘no rational view of the evidence’ test

27.188 At common law, even if the evidence of two or more witnesses has ‘striking similarities’, it can still be excluded because of its prejudicial effect. In order to prevent the admission of prejudicial propensity and similar fact evidence, the common law

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227 Ibid, 195. See, eg, the facts in AE v The Queen [2008] NSWCCA (in which the complainant was the defendant’s step-father); R v KP; Ex parte Attorney-General (Qld) [2006] QCA; R v Fletcher (2005) 156 A Crim R 308.

228 R v KP; Ex parte Attorney-General (Qld) [2006] QCA. The Queensland Court of Appeal held that the evidence of the older brother about being sexually abused by the defendant was not cross-admissible in relation to the counts involving the younger brother because of lack of similarities in the defendant’s alleged sexual behaviour. The Court held that charges relating to all complainants should not have been joined.


231 R v F [2002] NSWCCA 125, [28].

developed the ‘no rational view of the evidence test’, adopted by a majority of the High Court in *Hoch v The Queen*:

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

27.189 The test was confirmed by a majority of the High Court in *Pfennig v The Queen*, which held that the probative force of similar fact evidence will outweigh its prejudicial effect only if there is no rational view of the evidence that is consistent with the innocence of the accused.

27.190 This test is now referred to as the ‘*Pfennig test*’ and is the means for determining how the probative force of the evidence and prejudicial effect should be balanced. Where there is a rational view of the evidence consistent with the defendant’s innocence, the probative force of the evidence is automatically outweighed by its prejudicial effect, thus removing any discretion on the part of the trial judge to admit the evidence.

27.191 Probative force and prejudicial effect must also be considered under s 101(2) of the uniform Evidence Acts. In *R v Ellis*, the NSW Court of Criminal Appeal considered whether the *Pfennig test* should continue to be applied. The fact that s 101(2) introduced a legislative formulation for balancing probative value against prejudicial effect led Spigelman CJ to conclude that it did not. He stated that the continued application of a ‘no rational view’ test is not ‘consistent with a statutory test which expressly requires a balancing process’ and that the reasoning in *Pfennig* is ‘inapplicable to a statutory test that probative value substantially outweighs prejudicial effect’.

**A reasonable possibility of concoction**

27.192 It has been argued that, since the decision in *R v Ellis*, ‘the necessity to exclude the possibility of collusion or other influence is questionable’ when applying the balancing test under s 101(2) of the uniform Evidence Acts. Recent case law

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233 *Sutton v The Queen* (1984) 152 CLR 528, 564.
236 McHugh J considered that the test enunciated by Mason CJ, Deane and Dawson JJ in *Pfennig* was too stringent, although His Honour recognised that ‘where the prosecution case depends entirely on propensity reasoning, the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused’; *Ibid*, 530.
239 *Ibid*, [89]. The High Court granted Ellis leave to appeal but later revoked that leave, stating that it agreed with Spigelman CJ’s construction of the Evidence Act 1995 (NSW); *Ellis v The Queen* [2004] HCA Trans 488.
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indicates, however, that *R v Ellis* has not removed the issue of concoction from the admissibility equation under the uniform Evidence Acts.

27.193 Despite expectations that the courts would continue to develop the law away from *Hoch v The Queen*, obviating the need for legislative intervention, these expectations may have been ‘an overly optimistic view’. It has been argued that, in sexual assault cases, s 101(2) of the uniform Evidence Acts is only likely to be satisfied ‘if a reasonable possibility of concoction can be eliminated’.

27.194 In *R v Ellis*, Spigelman CJ accepted that there ‘may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the “no rational explanation” test were satisfied’, and that these cases may include those where a trial judge considers that there is a reasonable possibility of concoction.

27.195 The Tasmania Law Reform Institute (TLRI) has observed that, in practice, where a reasonable possibility of concoction is taken into account under s 101(2), this is no different from an application of the ‘no rational view of the evidence’ test, because concoction ‘weighs so heavily in the balance that the reality is that its existence means that there is no balancing to be undertaken’. The position, in the TLRI’s view, ‘effectively remains the same as that rejected … in *Ellis*’.

27.196 When a judge takes concoction or contamination into account, he or she can be seen as performing the task of the jury, by assessing the strength of the evidence—in particular, whether or not it is true. The TLRI noted that ‘no other exclusionary rule requires the court to determine the veracity of evidence as a basis for admission’.

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243 ‘[A]nd if there are sufficient similarities (striking or otherwise) between the evidence of two or more witnesses to be able to conclude that the probative value of the evidence outweighs its prejudicial effect’: A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 19–20.


248 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 39. This point was noted by McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, 517.
27.197 The application of the ‘no rational view of the evidence’ test in sexual assault trials is seen to have ‘particular consequences, since where there are two or more complainants, the probative force of the similar fact evidence is destroyed if there is a reasonable possibility of concoction between the complainants’. The courts do not, however, apply a universal standard for measuring what amounts to a reasonable possibility of concoction.

27.198 Where two or more children give evidence about a defendant’s sexual behaviour with them, the admissibility of their evidence may depend on whether they had the opportunity to concoct their allegations. While the targeting and grooming strategies of serial sex offenders are well documented in the literature, the rules governing the admissibility of propensity evidence are based on the belief that, if two or more complainants know each other, the possibility of concoction must be ruled out for one complainant’s evidence to be admissible in the case of another.

27.199 This assumption is based on the common law’s traditional belief that children are unreliable witnesses, prone to fantasy and highly suggestible—a view that may still prevail despite the fact that it is not supported by the psychological literature. Recent literature is said to show that ‘children are highly resistant to abuse suggestions and do not readily make up stories of sexual abuse even when given the opportunity to do so’.

27.200 Further, the test for concoction does not take into account the practical effects on complainants, since in assessing the possibility of concoction the court will usually conduct a pre-trial hearing, at which the complainants may be required to give evidence.

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253 A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 185.

254 This is said to conflict with ‘public policy objectives behind preventing child complainants from giving evidence on more than one occasion which has seen some jurisdictions enact provisions to prevent children being required to give evidence at committal proceedings’: Ibid, 185. Complainants are also likely to be cross-examined ‘more aggressively’ at a pre-trial hearing because of the absence of a jury: Tasmania Law Reform Institute, Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants, Issues Paper 15 (2009), 14.
Reform options

27.201 Several jurisdictions have enacted legislation to overcome problems caused in sexual assault cases by the ‘no rational view of the evidence’ test and with evidence being excluded on the basis of possible concoction.

27.202 In Queensland, s 132A of the Evidence Act 1977 (Qld) governs the admissibility of similar fact evidence and leaves the question of concoction to the jury:

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.

27.203 In addition, s 597A(1AA) of the Criminal Code (Qld) provides that, in determining whether there should be joint or separate trials, ‘the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion’.

27.204 In South Australia, reforms concerning the prosecution of sexual assault charges were enacted in 2008, following a review of rape laws. Under s 278(2a) of the Criminal Law Consolidation Act 1935 (SA), issues of joinder, the ‘no rational view of the evidence’ test and concoction are dealt with together. The provision creates a presumption that where there are two or more counts involving complainants, the counts are to be tried together. A judge may only order separate trials if the evidence of two or more complainants is not cross-admissible.

27.205 The ‘no rational view of the evidence’ test has been specifically abrogated in relation to determining whether evidence will be cross-admissible. Section 278(2a)(c) states that in determining admissibility for these purposes:

(i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and

(ii) the judge is not to have regard to—

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

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

255 Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008 (SA).
257 In contrast, the Victorian provision (discussed above in relation to a presumption of joint trials) attempts to encourage joint trials even where evidence is not cross-admissible: Criminal Procedure Act 2009 (Vic) s 194.
In Western Australia, s 31A of the Evidence Act 1906 (WA) deals with propensity evidence. Section 31A(2) provides:

(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.

Like the Queensland reforms, s 31A(3) removes the issue of concoction from the admissibility equation and leaves it to the jury when deciding the weight to be given to the evidence. The possibility of concoction cannot be taken into account when determining whether the propensity evidence has significant probative value. This means that the court has to take the evidence at ‘its highest’. Nor can the possibility of concoction be taken into account when the court is applying the balancing test under s 31A(2)(b), in particular the risk of an unfair trial, because of the quite clearly articulated legislative purpose of the provision.

Section 31A abrogates the common law ‘no rational view of the evidence’ test. The test introduced by s 31A(2)(b) is taken directly from the balancing test suggested by McHugh J, dissenting in Pfennig v The Queen. This test is much less stringent than the Pfennig test. In enacting s 31A, the legislature has accepted that, because of its nature, the admission of propensity evidence will always create the risk of an unfair trial. However, that risk must be balanced against the competing public interests in holding a joint trial in which all relevant evidence is admitted.

The balancing test, when referring to fair-minded people, clearly envisages that the public interest in the prosecution of sexual offences ought to be taken into consideration when weighing up the risk of prejudice to the accused. These

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258 The definition of propensity evidence under s 31A is more extensive than at common law and includes tendency, relationship and character evidence.

259 Di Lena v Western Australia (2006) 165 A Crim R 482, [51]; Wood v Western Australia [2005] WASCA, [41]; Donaldson v Western Australia (2005) 31 WAR 122, [108].

260 Donaldson v Western Australia (2005) 31 WAR 122, [154].

261 Ibid, [153] (Roberts-Smith JA).

262 Ibid, [157] (Roberts-Smith JA).

263 Pfennig v The Queen (1995) 182 CLR 461, 528.

264 Di Lena v Western Australia (2006) 165 A Crim R 482, [94].

265 Ibid, [58].

266 The decision made under s 31A is a question of law, not an exercise of a judicial discretion and, once admitted, there is no room to exclude the evidence under the discretion at common law: Ibid, [60], referring to R v Christie [1914] AC.
considerations may be important, especially in relation to child sexual assault, since a particular complainant’s evidence will often make more sense when evidence is given of the alleged serial nature of a defendant’s sexual behaviour. For example, in *VIM v Western Australia*, separate allegations of sexual assault over many years had been made by the two step-daughters of the accused, who was indicted on 44 counts. The Western Australian Court of Appeal considered that this was ‘an example of the very type of case in which the legislature intended the jury to have the benefit of a full evidentiary familial picture’.

None of the reforms enacted in Australia has addressed expressly the striking similarities test, which may still constitute a major barrier to the admissibility of tendency and propensity evidence and the ability to hold joint trials. The Western Australian reforms represent the most complete break from the common law. By articulating a particular threshold test of admissibility—that the evidence must have significant probative value—the common law striking similarities test may no longer be ‘a necessary criterion for admissibility’.

The National Child Sexual Assault Reform Committee has reviewed the effectiveness of the reforms discussed above. It concluded that the most successful appear to be those enacted in Western Australia—although in the absence of empirical research it is not possible to determine the extent to which, for example, the number of joint trials has increased in Western Australia as a result of those reforms.

In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that, in sexual assault proceedings, a court should not have regard to the possibility that the evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence.

The Consultation Paper also stated that further consideration may need to be given to the continued reliance of Australian courts on the striking similarities test for the admission of tendency, coincidence, propensity and similar fact evidence.

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267 *VIM v Western Australia* (2005) 31 WAR 1.
268 Ibid, 168.
269 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 202. The Western Australian Court of Appeal has accepted that, in a child sexual assault trial, propensity evidence need not show ‘striking similarities’ or sexual interference by the defendant in a particular way: *Donaldson v Western Australia* (2005) 31 WAR 122, [149]. If the evidence in question reveals an underlying unity, system or pattern, that will be sufficient to establish that the evidence has significant probative value under s 31A(2) ‘irrespective of what physical acts [were] individually involved’. In *Donaldson*, the evidence of the four complainants showed that the defendant, a swimming coach, had a particular pattern of conduct ‘or a tendency … by essentially similar means, to inveigle young girls under his charge into situations in which he then commits sexual offences upon them’: [149]. This was sufficient for the evidence of the four complainants to be cross-admissible.
(including in uniform Evidence Acts jurisdictions). The Commissions asked to what extent the ‘striking similarities’ test impedes the ordering of joint trials in relation to sex offences; and whether the Western Australian reforms in relation to the cross-admissibility of evidence should be adopted in other jurisdictions.\(^{272}\)

**Submissions and consultations**

27.214 Stakeholders expressed a range of views relating to the need for reform to address the implications of the striking similarities test. The perspectives of legal stakeholders differed, however, about the extent to which the test is being applied, in practice, in uniform Evidence Acts jurisdictions. A number also emphasised the impact of the issue within the family violence context.

27.215 The NSW ODPP submitted that the test is a ‘flawed approach to establishing the modus operandi of most sexual predators, but particularly in a family violence context and other instances where there is no issue as to the identity of the offender’. The NSW ODPP noted that rather than acting with a ‘hallmark’, there is more likely to be a ‘progression or an evolution’ in the offending behaviour—for example, in the case of a father who assaults several of his children.\(^{273}\) It stated that:

> the striking similarities test does impede the ordering of joint trials. The need to satisfy the test for the purposes of relying on tendency or coincidence evidence is one thing, but if the evidence fails that test it does not follow that the evidence is not relevant and probative in other ways.\(^{274}\)

27.216 Cossins considered that the striking similarities approach focuses on a need to find that ‘the sexual practices of the defendant with one complainant are more or less identical to his sexual practices with another complainant’ before their evidence will be considered to be tendency or coincidence evidence and cross-admissible in a joint trial.\(^{275}\) In her opinion, in uniform Evidence Acts jurisdictions,

> like the common law, it is only where there are sufficient similarities between the accounts given by the complainant and another witness that that witness’ evidence will be considered to have significant probative value under the [uniform Evidence Acts].\(^{276}\)

27.217 She submitted that the striking similarities test has been applied by the NSW Court of Criminal Appeal in a number of child sexual assault cases and is problematic for three key reasons:

   (i) Because the test does not accord with information about child sex offender behaviour described in the psychological literature, it amounts to a false measure for assessing the probative value of evidence about a defendant’s sexual behaviour.

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\(^{272}\) Ibid, Questions 18–7, 18–8.  
\(^{274}\) Ibid.  
\(^{275}\) This approach, she considers, has no empirical basis and appears to ‘reflect a subjective belief that sex offenders are highly specialised’ in the type of sexual behaviour they engage in, a view that is not supported by the research literature: A Cossins, Submission FV 112, 9 June 2010.  
\(^{276}\) Ibid.
(ii) Corroborative evidence of child sexual abuse is uncommon which is likely to be one of the reasons why low conviction rates are found in child sexual assault trials. Thus the striking similarities test is likely to contribute to low conviction rates where its effect is to exclude relevant corroborative evidence which is judged to be insufficiently similar with the evidence of the complainant.

(iii) If there is a lack of striking similarities between the evidence of two or more complainants, a joint trial is less likely to be held. This, in turn, will result in more separate trials with a decreased likelihood of serial sex offenders being convicted.277

27.218 Cossins proposed eliminating the ‘striking similarities’ test from the admissibility equation under the uniform Evidence Acts. She suggested that provisions be inserted stating that, in respect of a sexual offence, if two or more counts charging sexual offences involving different complainants are joined in the same indictment, the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual conduct of the defendant, in considering its probative value.278

27.219 The need for any reform in relation to the striking similarities test, at least in NSW, was contested by other stakeholders.279 The Public Defenders Office NSW submitted that NSW courts are not bound to a ‘striking similarities’ test, but rather a rational assessment of probative value under the Evidence Act 1995 (NSW). Further, it was submitted that the distinction between the positions in NSW and Western Australia with regard to the admissibility of tendency (or propensity evidence) may not be as significant as suggested by the Consultation Paper. In particular, in NSW as in Western Australia,280 ‘a distinctive system of grooming and exploitation will often have more sway than similarity of the physical acts involved’.281

27.220 Stakeholders also held divergent views on the desirability of reforms to evidence laws to ensure that the possibility of concoction does not, by itself, render inadmissible the evidence of witnesses in sexual assault proceedings. Some stakeholders, including legal professionals, supported the Consultation Paper proposal.282

27.221 The NSW ODPP stated that allegations of concoction, collusion or suggestion are better assessed by a jury than rendered inadmissible. Otherwise these matters become a significant barrier to the joinder of charges in respect of multiple complainants because:

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277 Ibid.
278 Ibid.
279 National Legal Aid, Submission FV 232, 15 July 2010; Public Defenders Office NSW, Submission FV 221, 2 July 2010.
280 See, eg, Donaldson v Western Australia (2005) 31 WAR 122.
281 Public Defenders Office NSW, Submission FV 221, 2 July 2010.
it is very difficult to exclude a reasonable possibility of concoction if the complainants are well known to each other, particularly siblings;

this issue arises in all institutional sexual assault allegations such as involving teachers, because invariably the victims know each other as they were all at school together;

there is not a great deal of case law in this area, because many prosecutors do not run counts together if they involve siblings because it is almost impossible to exclude the reasonable possibility of concoction …

Women’s Legal Services NSW submitted:

The unique features of sexual assault offences and child sexual assault offences require, in our view, unique legislative solutions. These solutions must reflect the realities for many sexual assault complainants: complainants, particularly children, often know each other and often have some form of connection or relationship. This connection is most often not indicative of concoction.

The Law Council stated that it would not oppose a provision that stated that ‘the possibility’ of concoction should not be a basis on which to hold tendency or coincidence evidence inadmissible—as long as the provision did not preclude concoction from being taken into account in determining admissibility under relevant tests.

Other stakeholders opposed the proposal. National Legal Aid observed that if ‘the possibility of concoction, collusion or suggestion cannot be excluded, the probative value of the evidence is properly diminished’.

The Public Defenders Office NSW submitted that there was insufficient cause ‘for taking the radical step of pulling one area of criminal prosecution outside the uniform framework of evidentiary rules’. The Public Defenders noted that specific consideration needs to be given to whether the evidence is being put forward as tendency or coincidence evidence. That is, if the evidence is coincidence evidence ‘the reduction in probative value where there is a real possibility of contamination has nothing to do with assumptions based on the common law’s traditional belief that children are unreliable witnesses, prone to fantasy, and highly suggestible’. Rather, it was submitted that:

it is a realistic assessment of the difference in the force of the argument ‘What are the chances of two people coming up with a similar allegation?’ where the complainants know one another. Logic requires recognition that such an argument has greater force

Law Council of Australia, Submission FV 180, 25 June 2010. That is, it should still be inadmissible where ‘the evidence is, for example, overwhelming that two complainants have jointly prepared their complaints’.
National Legal Aid, Submission FV 232, 15 July 2010; Public Defenders Office NSW, Submission FV 221, 2 July 2010; Law Society of New South Wales, Submission FV 205, 30 June 2010; Barrister, Consultation, Sydney, 10 June 2010.
National Legal Aid, Submission FV 232, 15 July 2010.
for the Crown where the complainants have never met nor heard of each other’s claims.288

Commissions’ views

27.226 The application of rules of evidence applying to tendency and coincidence evidence has an important impact on sexual assault proceedings, including in relation to sexual assault committed in a family violence context. These rules of evidence may render some evidence inadmissible and mean that, where two or more complainants have allegedly been sexually assaulted by the same defendant, a joint trial may not be possible.289

27.227 In ALRC 102, the ALRC, NSWLRC and VLRC highlighted the difficult task of formulating appropriate rules to deal with probative but prejudicial evidence. In relation to tendency and coincidence evidence, the Commissions recognised ‘a stark contrast between the policy objectives of receiving all probative evidence, and minimising the risk of wrongful conviction’.290

27.228 In child sexual assault cases, however, it seems unfair to victims and their families that:

    in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from other family members not before the Court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded.291

27.229 In common law evidence jurisdictions, such perceived problems with the operation of rules of evidence in sexual assault proceedings have led to legislative reform. In the Commissions’ view, there is no reason to recommend reform in uniform Evidence Acts jurisdictions to respond to the ‘striking similarities’ or ‘no rational view of the evidence’ (Pfennig) tests—as has occurred in Western Australia and South Australia. There is a case, however, for specific reform in relation to the impact on admissibility of evidence of a ‘reasonable possibility of concoction’.

Striking similarities

27.230 Although there have been a number of reforms in different jurisdictions to increase the frequency of joint trials in relation to sex offences, only one common law jurisdiction (Western Australia) has abandoned striking similarities as the test for admissibility of propensity evidence.

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288 Public Defenders Office NSW, Submission FV 221, 2 July 2010.
289 See Ch 26.
It has been suggested that, without changes in the application of the striking similarities test, including in uniform Evidence Acts jurisdictions, reforms to increase the number of joint trials may be undermined. The striking similarities test may also impede the prosecution’s ability to adduce evidence about the defendant’s sexual conduct from witnesses in trials which involve one complainant.

In *Ellis*, the NSW Court of Criminal Appeal confirmed that the tendency and coincidence rules in the uniform Evidence Acts should be construed according to their own terms and excluding prior common law principles (such as the striking similarities test). Rather, the test for the admissibility of tendency and coincidence evidence is whether the evidence has significant probative value substantially outweighing any prejudicial effect.

Similarity or dissimilarity are still commonly referred to in assessing probative value in applying this statutory balancing test—as are other concepts such as ‘pattern’. For example, in *R v Fletcher*, the NSW Court of Criminal Appeal, in finding that certain evidence was not admissible, stated that there was ‘in the matter now before the Court, insufficient pattern or underlying unity; there are no striking similarities or unusual features … ’.

The NSW cases since *Ellis* confirm the continuing role that the existence of similarities and dissimilarities has in assessing the probative value of tendency and coincidence evidence. They do not show, however, that any strict ‘striking’ similarities test continues to be applied. The use of the concept of similarity seems unavoidable in construing the uniform Evidence Acts tendency and coincidence provisions. The coincidence rule itself refers to ‘similarities’ in the events or circumstances about which evidence is sought to be adduced. This may not, however, prevent development of the law to recognise that evidence of patterns of behaviour or systematic activities (such as those relating to ‘grooming’) may have significant probative value, even where there is no close similarity in the physical acts involved.

In the Commissions’ view, there is insufficient reason to recommend reform in uniform Evidence Acts jurisdictions to address perceived over-reliance on ‘striking similarities’ as a test for the admissibility of tendency or coincidence evidence. The real question is whether the tendency and coincidence rules should continue to apply to

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294 Uniform Evidence Acts, ss 97, 98, 101. The TLRI has recently stated that there is no requirement under the Evidence Act 2001 (Tas) for a striking similarity: Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants, Issues Paper 15* (2009), Part 6, 57.
296 Ibid, [165]. In Victoria, under the *Evidence Act 2008* (Vic), the Court of Appeal has stated that there must be something ‘distinctive’ about evidence of an accused’s conduct for it not be excluded as coincidence evidence: *PNJ v Director of Public Prosecutions (Vic)* [2010] VSCA, [20].
297 *R v Milton* [2004] NSWCCA; *R v GAC* [2007] NSWCCA.
298 Uniform Evidence Acts, s 98.
sexual assault proceedings involving multiple complainants or entirely different rules developed for this particular category of evidence. The Commissions are not convinced that a case has been made out for such special rules of evidence applicable only in sexual assault proceedings. Such rules would risk introducing complexity and uncertainty in uniform Evidence Acts jurisdictions.

27.236 Further, the Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend reforms to evidence law in common law evidence jurisdictions directed to the striking similarities test. Rather, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

No rational view of the evidence
27.237 The National Child Sexual Assault Reform Committee suggested reforms to overcome the effect of the ‘no rational view of the evidence’ test in jurisdictions which have not already introduced reforms to do so. The suggested reform would expressly eliminate ‘whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant’ as an issue when a court is required to decide whether to order joint or separate trials. 300

27.238 The test does not apply in uniform Evidence Acts jurisdictions and has been overridden by legislation in Western Australia and South Australia. It may still apply in Queensland and the Northern Territory. The Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend specific reforms to evidence law in those two jurisdictions. Again, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

Reasonable possibility of concoction
27.239 In the Commissions’ view, in sexual assault proceedings it is not appropriate for the possibility of concoction to render evidence inadmissible—for example, when the prosecution seeks to call a witness who, while not a complainant, can give evidence about the defendant’s sexual behaviour with him or her and has had contact with the complainant. This may occur in cases of sexual assault in a family violence context.

27.240 The current law appears to be that a reasonable possibility of concoction can affect the admissibility of propensity and similar fact evidence in common law evidence jurisdictions. At common law, the possibility of concoction will almost certainly render propensity and similar fact evidence inadmissible.

27.241 Under the uniform Evidence Acts, concoction is a factor that the court may consider in assessing probative value and applying the balancing test under ss 97, 98 and 101 respectively. However, it appears that case law may be evolving towards

300 A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, Rec 3.7. The recommendation is based on Criminal Procedure Act 2004 (WA) s 133(5)–(6).
exclusion of evidence of multiple complainants where there is a possibility of concoction.301

27.242 In NSW, while some stakeholders submitted that the concoction issue does not dominate consideration of admissibility,302 others considered that judicial officers tend towards excluding evidence where possible concoction is raised. Prosecutors perceived a resulting high bar to joint trial in such cases.303 In practice, it is difficult to exclude a reasonable possibility of concoction where, for example, complainants are siblings.

27.243 The National Child Sexual Assault Reform Committee has made recommendations to address this barrier to the admission of tendency and coincidence (propensity and similar fact) evidence.304 The Commissions agree that there is a case for reform.

27.244 The Commissions recommend that federal, state and territory legislation should provide that, in sexual assault proceedings, tendency or coincidence evidence is not inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

27.245 In uniform Evidence Acts jurisdictions, the appropriate mechanism would be amendment of Part 3.6 of the Acts—for example, by the insertion of a new section following s 101 (which deals with restrictions on tendency evidence and coincidence evidence adduced by the prosecution). This recommendation for reform of the uniform Evidence Acts would need to be considered by the Australian and state and territory governments through SCAG.

27.246 The Commissions’ preference would be for all Australian jurisdictions to join the uniform Evidence Acts scheme. Failing this, however, common law evidence jurisdictions that have not already done so should enact similar amendments in criminal procedure or evidence legislation providing that propensity evidence and similar fact evidence must not be ruled inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

### Recommendation 27–13
Federal, state and territory legislation should provide that, in sexual assault proceedings, tendency or coincidence evidence is not inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

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301 Law Society of New South Wales, Submission FV 205, 30 June 2010.
302 Public Defenders Office NSW, Submission FV 221, 2 July 2010.
304 The Committee proposed amendments to ss 97, 98 and 101 of the uniform Evidence Acts, of general application to tendency and coincidence evidence and that other jurisdictions make similar amendments with respect to the admissibility of propensity and similar fact evidence: A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, Recs 3.8, 3.9.
Relevance and consent

27.247 A related concern arises from the High Court’s decision in Phillips v The Queen\(^{305}\) (Phillips). Phillips involved a joint trial with six complainants. The prosecution called all six complainants who gave evidence about the defendant pursuing sexual activity with them in circumstances where they did not consent.

27.248 The trial judge had found that the probative value of the evidence was its ability to show the ‘improbability of similar lies by each of the complainants’.\(^{306}\)

That is, one girl might deliberately make up a lie that [the appellant] dealt with her sexually without her consent; two might possibly make up a lie to that effect; but the chances or the probability that all six have made up such a lie, in my view, becomes remote in the extreme in the absence of any real risk of concoction.\(^{307}\)

27.249 The High Court quashed the convictions based on its finding that the decision to join the charges in a single indictment was wrong in law.\(^{308}\) The Court observed that:

Normally similar fact evidence is used to assist on issues relating only to the conduct and mental state of an accused … But where a particular count supported by one complainant’s evidence raises the issue of whether she consented to certain conduct by an accused, the issue relates much more to her mental state than his. The trial judge kept referring to ‘the improbability of similar lies’ on that issue. That is an expression used by Mason CJ, Wilson and Gaudron JJ in Hoch v The Queen … ; however, as counsel for the appellant pointed out, they used it not on the question of whether the complainants in that case consented, but on whether the accused behaved towards them as he said he did. To tell the jury that the evidence went to the improbability of each complainant lying or being unreliable about consent was to say that a lack of consent by five complainants tended to establish lack of consent by the sixth.\(^{309}\)

27.250 The Court held that the evidence of each complainant about whether they consented to sexual activity with the accused was not cross-admissible in relation to the counts involving the other complainants on the grounds of lack of relevance.

27.251 On one view, Phillips may have application to any sexual assault proceedings where there are multiple complaints of sexual assault against the same defendant and where consent is a fact in issue.\(^{310}\) There is some case law indicating that

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306 Ibid, [33].
307 Ibid, [38] quoting White J, the trial judge.
308 Phillips was a serial offender who was later convicted of other counts of sexual assault while awaiting the outcome of his High Court appeal: D Hamer, ‘Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious’ (2007) 30 University of New South Wales Law Journal 609, 610.
309 Phillips v The Queen (2006) 225 CLR 303, [46].
Phillips may be applied to prevent joint trials being held in relation to multiple allegations against the same defendant.\(^{311}\)

**Consultation Paper**

27.252 The Consultation Paper asked what impact Phillips v The Queen has had on the prosecution of sexual assaults where there are multiple complaints against the same defendant and whether there is a need to introduce reforms to overturn the decision.\(^{312}\)

27.253 Some stakeholders considered that reform should address the implications of the decision in Phillips.\(^{313}\) The Women’s Legal Service Queensland stated that, at least in Queensland, the decision had made it more difficult to conduct joint trials.\(^{314}\) NASASV supported ‘overturning the rulings’ in Phillips. NASASV emphasised the impact of Phillips in the family violence context, noting that where ‘victims are from the one family the impact of multiple trials is enormous’ and can adversely affect the complainants’ ‘motivation and determination to continue through the whole process’.\(^{315}\)

27.254 Cossins put forward a detailed case for legislative reform to address the impact of the decision in Phillips.\(^{316}\) She submitted that, without such reform, the effect of the Commissions’ proposal to encourage more joint trials where there are multiple complainants, by introducing a presumption of joint trial,\(^{317}\) would be undermined.

27.255 Cossins suggested that evidence law should recognise that multiple complaints of sexual assault can be ‘corroborative in nature’ where there is a ‘sufficient connection in the circumstances associated with the complaints’.\(^{318}\) The provision would apply to sexual assault proceedings if two or more counts charging sexual offences involving different complainants are joined in the same indictment. It would state that, in a joint trial involving two or more counts, the evidence of one complainant about the alleged sexual acts and behaviour of the defendant or the circumstances giving rise to the sexual acts, is admissible as corroborative evidence in relation to the issue of lack of consent by another complainant, if there is a ‘sufficient relationship’—in terms of the circumstances and events giving rise to the offences, between the evidence of the first and second complainants.\(^{319}\)

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\(^{312}\) Consultation Paper Questions 17–8, 17–9.


\(^{314}\) Women’s Legal Service Queensland, Submission FV 185, 25 June 2010.


\(^{316}\) A Cossins, Submission FV 112, 9 June 2010.

\(^{317}\) Consultation Paper, Proposal 17–4.

\(^{318}\) A Cossins, Submission FV 112, 9 June 2010. The application of any striking similarities test to such evidence would also be excluded.

\(^{319}\) These circumstances would include but not be limited to: (i) the proximity in time of the sexual acts; (ii) the number of occurrences of the sexual acts; (iii) the behaviour accompanying the sexual acts, including evidence of the use of intoxicating substances, pornography, force, violence or threats of force or violence; and (iv) the social context surrounding or relating to the sexual acts: Ibid.
Commissions’ views

27.256 In the Consultation Paper, the Commissions observed that the decision in Phillips has also been the subject of strong academic criticism. The most stringent criticism relates to use of relevance in the High Court’s reasoning in Phillips.

27.257 Associate Professor Jeremy Gans states, for example, that while the Court could have overturned the convictions on the basis of rules relating to the admissibility of propensity or similar fact evidence, the Court, ‘having misunderstood the reasoning left to the jury, instead framed its rejection of the cross-admissibility of the multiple complaints in terms of relevance’. That is, the Court held that ‘evidence that five complainants did not consent could not rationally affect the assessment of the probability that the sixth complainant did not consent’. However, it may be argued that the jury was actually being asked to consider the improbability that all six complainants lied when they said they did not consent to the defendant’s sexual acts—quite a different premise.

27.258 David Hamer has also questioned the logic of the High Court’s decision in Phillips, stating that:

The relevance of such evidence is clear. The fact that the defendant forced other victims to have non-consensual sex with him tends to show he has a propensity for forcing women to have non-consensual sex with him, and it increases the probability that the defendant forced the complainant to have non-consensual sex with him.\[323\]

27.259 The fact that the High Court made its ruling on the relevance of propensity or similar fact evidence means the case is applicable in all jurisdictions because all retain a requirement of relevance as the threshold test for admissibility.

27.260 The Commissions recognise that there are valid concerns about the effect of this aspect of the decision in Phillips on the conduct of sexual assault proceedings, including those involving family violence. However, the practical implications of Phillips, and for the prospects of joint trials in particular, remain unclear. The TLRI, in its critique of the decision, stated that:

it is not inevitable that the High Court’s ruling on consent will apply. In particular, the Institute considers that the decision’s potentially restrictive impact on the issue of consent can be avoided by approaching the evidence of multiple complainants as

322 Ibid, 231.
tendency evidence that reveals the accused’s tendency to have sexual intercourse without consent. This is relevant to the circumstances of the sexual intercourse. 324

27.261 A recent Western Australian Court of Appeal decision, Owen JA stated that he did ‘not read anything said in Phillips as meaning that where consent is in issue propensity evidence that might bear on the presence or absence of consent must necessarily be inadmissible’. 325

27.262 Any proposed legislative solution to overturn the decision would be complex and risk introducing new uncertainties—as is the case with the solution proposed by Cossins and its new test of ‘sufficient relationship’. The Commissions therefore do not make any recommendation in this regard.

Relationship evidence

27.263 If there is only one complainant, the prosecution may want to lead evidence from other witnesses about the defendant’s criminal sexual behaviour with them, or it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, as well as the context in which the sexual assault occurred.

27.264 Evidence of uncharged acts of sexual misconduct is commonly referred to as ‘relationship’, ‘context’ or ‘background’ evidence and is a type of circumstantial evidence. While relationship evidence describes all conduct ‘of a sexual kind’ which is often referred to as ‘uncharged acts’, it also includes grooming behaviours that do not amount to an offence, such as the purchase of gifts and non-sexual touching. 326

27.265 Relationship evidence forms part of the background against which the complainant’s and the defendant’s evidence are assessed. 327 In a sexual assault trial, relationship evidence may be relevant for a number of different reasons including to: provide a context in, or background against, which to understand the charges laid against the defendant; explain why the complainant complied with the sexual demands of the defendant without surprise; explain why the complainant failed promptly to complain; and explain the defendant’s confidence in committing the sexual acts or his control over the complainant. 328

27.266 Where such evidence is admissible, it ‘cannot be used by the jury to reason that, if the accused committed the uncharged acts, he or she is more likely to have committed the charged acts’. 329 However, the distinction between relationship evidence

324 Tasmania Law Reform Institute, Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants, Issues Paper 15 (2009), 54.
325 Stubley v Western Australia [2010] WASCA, [2].
327 B v The Queen (1992) 175 CLR 599, 610 (sexual offences against defendant’s daughter).
328 A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 235. See, eg, R v Vonars [1999] 3 VR.
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and tendency evidence has been described as 'somewhat artificial' since evidence which shows the 'existence of a sexual relationship must surely tend to show that the accused [has a tendency] to do the sort of things the subject of the charge'.

Nonetheless, many cases have held that evidence of uncharged sexual behaviour between a complainant and an accused is admissible. Relationship evidence has a long history of being admitted in all types of criminal trials.

In the last decade, however, the admissibility of relationship evidence has had a conflicted history with 'sharp divisions' in the High Court about when and for what purposes such evidence should be admissible. This division saw a majority attempt to restrict the admission of such evidence at common law in Gipp v The Queen. This case resulted in considerable uncertainty about the test that should be applied to admit relationship evidence.

Case law

It is possible that this uncertainty has been resolved by the High Court decision in HML v The Queen (HML). HML only applies to cases of child sexual assault, where lack of consent is not one of the issues to be decided and in jurisdictions that have not overturned the 'no rational view of the evidence' (Pfennig) test.

330 A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 236.
333 The reception of ‘this type of evidence has come to be routine and unsurprising’: HML v The Queen (2008) 235 CLR 334, [271]–[272].
334 Ibid, [328].
335 Gaudron J considered that the admissibility of propensity evidence in the form of past criminal conduct (including relationship evidence) was only warranted in a few specified situations, eg, where the defence raised specific issues such as evidence of good character or lack of surprise or failure to complain on the part of the complainant: Gipp v The Queen (1998) 194 CLR 106, 112. Callinan J stated that if such evidence is to be admitted ‘it must owe its admissibility to some, quite specific, other purpose, including eg, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive’: Gipp v The Queen (1998) 194 CLR 106, [182]. See also Tully v The Queen (2006) 230 CLR 234, [144]–[145]. Kirby J stated that relationship evidence should only be ‘admissible if its probative value outweighs its prejudicial effect’: Gipp v The Queen (1998) 194 CLR 106, [141].
336 HML v The Queen (2008) 235 CLR 334, [163]. This uncertainty has been evident, eg, in the different approaches taken by the Full Court of the Supreme Court of South Australia in R v Nieterink (1999) 76 SASR 56 and the Court of Appeal of Victoria decision in R v Vonarx [1999] 3 VR.
337 Although ‘the six different judgments in the case may continue to confound rather than enlighten the law on relationship evidence’: A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 237.
338 HML v The Queen (2008) 235 CLR 334, [102].
339 Ibid, [54]. The case does not apply to the admission of relationship evidence under the uniform Evidence Acts, nor under Evidence Act 1906 (WA) s 31A. The Pfennig test still applies in Queensland, SA and the NT.
The issues in HML, a case involving sexual abuse by a father of his daughter, included when and in what circumstances evidence of uncharged acts of sexual misconduct is admissible in a child sexual assault trial and what test applies to its admission. All seven judges accepted that there are important reasons why evidence of uncharged acts of sexual misconduct by the defendant ought to be admissible in child sexual assault trials. The public policy reasons recognised for permitting the child to give evidence of uncharged acts included:

- ‘multiple and repeated incidents over a period of time’ are typical of the sexual abuse of children (and this is particularly so in the context of sexual assault perpetrated by family members);
- the impracticality or impossibility of being able to charge every multiple incident of sexual abuse;
- the importance of legal procedure to facilitate the giving of a ‘fair and coherent account’ by the complainant of what has occurred;
- the exclusion of evidence of uncharged acts would mean that the complainant’s evidence of the charged acts of sexual misconduct would be viewed in isolation and sometimes as if the complainant was sexually abused ‘out of the blue’;
- the artificiality of attempting to ‘quarantine the charged acts’ from other incidents;
- the seriousness of child sexual assault as a crime and its historical under-enforcement which ought not to be frustrated by ‘unjustifiably restrictive court procedures’; and
- because today’s juries are ‘better educated and more literate’, there is less need for restrictive rules for excluding relevant but prejudicial evidence.

In HML, all seven judges agreed that uncharged acts of sexual misconduct are likely to be relevant to the facts in issue in a child sexual assault trial, that is, whether the defendant committed the sexual acts that constitute the charges. However, the relevance test was not considered to be a sufficient control on the admissibility of relationship evidence by Gummow, Kirby and Hayne JJ, all of whom

341 HML v The Queen (2008) 235 CLR 334, [56].
342 This includes ‘the social interest in convicting those guilty of crimes against small children which are both grave and difficult to prove’: Ibid, [331].
343 For example, Hayne J stated that ‘[p]roving that the accused not only had that sexual interest but had given expression to that interest by those acts, made it more probable that he had committed the charged acts’: Ibid, [103]. As discussed above, the evidence may also be relevant on other grounds, such as to explain the complainant’s delay in complaint, although some of those reasons may only be directly relevant to the credibility of the complainant: HML v The Queen (2008) 235 CLR 334, [426].
agreed that, in addition to relevance, evidence of uncharged acts should not be admissible unless the Pfennig test is satisfied.\(^{344}\)

27.272 The National Child Sexual Assault Reform Committee has noted that ‘lower courts may not find it all that easy to decide whether to apply the approach of Gummow, Kirby and Hayne JJ, or the approach of the other four judges’,\(^ {345}\) who either did not agree that the Pfennig test applied to relationship evidence at all,\(^ {346}\) or did not think the Pfennig test applied to the relationship evidence in the cases at hand, even though there may be other situations in which it would apply.\(^ {347}\)

27.273 In HML, Kiefel J considered that only where relationship evidence is being tendered for its tendency purpose should the Pfennig test be applied. This is the same approach that is taken in uniform Evidence Acts jurisdictions where the test under s 101(2) does not apply to relationship evidence which is tendered for a non-tendency purpose.\(^ {348}\)

Reform options

27.274 The National Child Sexual Assault Reform Committee proposed that, because of the different and inconsistent approaches taken by the judges in HML to the admissibility of relationship evidence, the Pfennig test at common law should be abolished in relation to the admissibility of relationship evidence.\(^ {349}\) This would bring common law jurisdictions in line with those that do not use the test (or use the balancing test under s 101 of the uniform Evidence Acts) to admit relationship evidence—that is, Western Australia and the uniform Evidence Acts jurisdictions.

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\(^{344}\) HML v The Queen (2008) 235 CLR 334, [359] (Kirby J); [106] (Hayne J with whom Gummow J agreed). The purpose for adopting the Pfennig test is to place an extra control over ‘the discreditable facts’ that are admitted against an accused. Without such a control any relevant discreditable facts would be able to be tendered against an accused simply because they throw some light on the ‘context’ of the offences: HML v The Queen (2008) 235 CLR 334, [80]. Nonetheless, Hayne J considered that evidence of uncharged acts would usually satisfy the Pfennig test because ‘there will usually be no reasonable view of the evidence … other than as supporting an inference that the accused is guilty of the offence charged’: HML v The Queen (2008) 235 CLR 334, [107]. Although Hayne J recognised the disadvantage to the defendant by admitting such evidence, His Honour considered that ‘its admission would work no prejudice to the accused over and above what the evidence establishes’: HML v The Queen (2008) 235 CLR 334, [110].

\(^{345}\) A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 240.

\(^{346}\) HML v The Queen (2008) 235 CLR 334, [455] (Crennan J); [511]–[512] (Kiefel J).

\(^{347}\) See Ibid, [27] (Gleeson CJ); [264] (Heydon J).

\(^{348}\) Ibid, [503], [505]. In ALRC Report 102 the ALRC, NSWLRC and VLRC considered whether the balancing test under s 101(2) of the uniform Evidence Acts should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although tendered for a non-tendency or non-coincidence purpose—such as relationship evidence: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, Uniform Evidence Law, Report 102, NSWLRC Report 112, VLRC FR (2005), [11.76]–[11.93]. The Commissions concluded that the case had not been made out for change, which would be unlikely to result in different outcomes where questions arise as to the admissibility of evidence relevant for tendency or coincidence purposes and for other purposes.

\(^{349}\) A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, Rec 3.14.
Consultation Paper

27.275 In the Consultation Paper, the Commissions asked whether the Pfennig test should be applied to determine the admissibility of relationship evidence at common law.\textsuperscript{350} Few stakeholders responded to this question.\textsuperscript{351} The Public Defenders Office NSW confirmed that the Pfennig test is not applied to relationship evidence.\textsuperscript{352}

27.276 Cossins provided a detailed analysis of HML and associated law and submitted that the application of the Pfennig test to relationship evidence ‘is to interpose an extra test of relevance which is both illogical and unnecessary’. Cossins submitted that a specific provision that abrogates the Pfennig test should be enacted ‘to ensure that relationship evidence is admissible if it passes the relevance test, with appropriate warnings to be given to the jury about how they may use the evidence’. In her view, such a provision would ensure that relationship evidence at common law ‘is not subject to the rule in Pfennig where the evidence is tendered for a non-tendency purpose in a child sexual assault trial’.\textsuperscript{353}

Commissions’ views

27.277 In the Commissions’ view, the ‘no rational view of the evidence’ (Pfennig) test should not apply to relationship evidence. As discussed above, in uniform Evidence Acts jurisdictions, the Pfennig test does not apply, even to tendency and coincidence evidence. There is no need for further provisions to deal specifically with relationship evidence, as defined in this discussion, beyond the general relevance test and other rules set out in the uniform Evidence Acts.

27.278 Reform directed to the admissibility of relationship evidence in common law evidence jurisdictions would be problematic given the uncertainty over the meaning and practical effect of the decision in HML. Complex legislative drafting would be required to remove doubt about the possible application of the test to relationship evidence in Queensland, South Australia and the Northern Territory. The reform would require the development of a statutory definition of relationship evidence and deal with the purposes for which the evidence may be used, directions to the jury and so on.\textsuperscript{354}

27.279 The Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend reforms to evidence law in common law evidence jurisdictions directed to relationship evidence. Rather, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

\textsuperscript{350} Consultation Paper, Question 18–9.
\textsuperscript{351} The Northern Territory Legal Aid Commission responded in the affirmative: Northern Territory Legal Aid Commission, Submission FV 122, 16 June 2010.
\textsuperscript{352} Public Defenders Office NSW, Submission FV 221, 2 July 2010.
\textsuperscript{353} A Cossins, Submission FV 112, 9 June 2010.
\textsuperscript{354} See, eg, A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee.
Evidence of recent and delayed complaint

27.280 Complaint evidence is a type of prior consistent statement which is given by a witness or the complainant about when the complainant made their first report of sexual assault. The common law recent complaint rule only allows this type of evidence to be admissible if the complaint was made at the first reasonable opportunity after the alleged sexual assault. Further, it is only admissible for credibility purposes, that is, to bolster the credit of the complainant. At common law, evidence of recent complaint cannot be used to prove the facts in issue—that is, whether or not the complainant consented or the defendant committed the alleged sexual conduct.

27.281 By the beginning of the eighteenth century, a failure to complain immediately had evolved into a presumption of fabrication on the part of the rape complainant. Since the rule was based on ‘the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness whose credibility could be boosted by evidence of recent complaint’.

27.282 The common law’s approach to recent complaint evidence meant that evidence of delayed complaint was also considered to be relevant to credibility but for a different purpose—to undermine the complainant’s credibility. Evidence of delayed complaint is commonly used by defence counsel to argue that a complainant has falsely accused the defendant of sexual assault. This may be especially likely in a family violence context where, for example, there has been sexual abuse of a family member over a number of years.

Uniform Evidence Acts jurisdictions

Recent complaint

27.283 The recent complaint rule is no longer applicable in uniform Evidence Acts jurisdictions. In Papakosmas v The Queen, the High Court held that recent complaint evidence is relevant to the facts in issue in a sexual assault trial, for example, whether the complainant consented to have intercourse with the appellant. In a child sexual assault trial, evidence of recent complaint is relevant to whether the defendant committed the act, since consent is not a fact in issue.

27.284 Evidence of a complainant’s recent complaint is caught by the exclusionary hearsay rule under s 59 of the uniform Evidence Acts. Evidence of the complaint may nevertheless be admissible under the first-hand hearsay exception, where the

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357 A Cousins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 141.
358 Papakosmas v The Queen (1999) 196 CLR 297, 309.
complainant is available to give evidence,\textsuperscript{359} and the \textquote{fresh in the memory} test is satisfied. Section 66(2) of the uniform Evidence Acts states:

\begin{quote}
(2) If a person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
\begin{itemize}
\item[(a)] that person; or
\item[(b)] a person who saw, heard or otherwise perceived the representation being made;
\end{itemize}
if, when the representation was made, the occurrence of the asserted fact was \textit{fresh in the memory} of the person who made the representation (emphasis added).
\end{quote}

27.285 The effect of s 66(2) was confirmed in \textit{Papakosmas v The Queen}, in which evidence of recent complaint was held to be relevant to the issue of consent and to satisfy s 66(2).\textsuperscript{360}

\textbf{Delayed complaint}

27.286 In \textit{Graham v The Queen}, the High Court was required to consider the scope of the \textquote{fresh in the memory} test under s 66(2). Instead of evidence of recent complaint, a witness had given evidence about the complainant\textquotesingle s disclosures made six years after the alleged sexual assault. The High Court held that the witness\textapos; evidence was not admissible under s 66(2) because the complainant had not told her friend she was sexually abused by her father when the events were fresh in her memory. The High Court interpreted the word, \textquote{fresh} to mean \textquote{recent} or \textquote{immediate} so that the lapse of time \textquote{will very likely be measured in hours or days, not, as was the case here, in years}.\textsuperscript{361}

27.287 In ALRC 102, the ALRC, NSWLRC and VLRC recommended retention of the concept of \textquote{fresh in the memory} under s 66(2) with an extension of the matters to be taken into account in determining what is \textquote{fresh in the memory} to address the restrictive interpretation in \textit{Graham v The Queen}. The Commissions concluded that \textquote{understanding of memory processes has progressed significantly} since the uniform Evidence Acts were first introduced and \textquote{the law should reflect that knowledge}.\textsuperscript{362}

\begin{footnotes}
\item The complainant is the person who made the previous representation and is available to give evidence about the asserted fact, the asserted fact being a fact that a person (who made a previous representation) intended to assert by the representation: s 59. In a sexual assault trial, the complainant is the Crown\textapos;s chief witness who, if competent, is available to give evidence.
\item Three of the complainants\textapos; work colleagues were able to give evidence not only of the complainant\textapos;s crying and distressed state after emerging from the ladies\textapos; toilets but also of her statements to them that \textquote{Papakosmas raped me}. This particular statement was held to fall within s 66(2) because the complainant had informed her work colleagues about being sexually assaulted by the accused almost immediately after the events in question so that the \textquote{fresh in the memory} requirement was satisfied: \textit{Papakosmas v The Queen} (1999) 196 CLR 297, 300–301.
\item \textit{Graham v The Queen} (1998) 195 CLR 606, 608.
\item Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, \textit{Uniform Evidence Law}, Report 102, NSWLRC Report 112, VLRC FR (2005), 253. ALRC Report 102 noted research showing that \textquote{while focusing primarily on the lapse of time between an event and the making of a representation about it might be justifiable in relation to memory of
27. Evidence in Sexual Assault Proceedings

27.288 ALRC 102 recommended that a new sub-section should be inserted into s 66.363 This recommendation was subsequently enacted, with some re-wording, as s 66(2A):

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and
(b) the age and health of the person, and
(c) the period of time between the occurrence of the asserted fact and the making of the representation.364

Other modifications to the common law

27.289 Queensland, Western Australia and South Australia have enacted provisions that address some of the problems with the recent complaint rule at common law.365 Queensland has enacted a specific provision that applies to the admission of out-of-court statements in sexual assault trials. Section 4A(2) of the Criminal Law (Sexual Offences) Act 1978 (Qld) states:

Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.

27.290 This provision does not allow evidence of the content of the statement to be admissible, only evidence of how and when the statement was made—although it does allow this evidence to be admitted regardless of when the complaint was made. Admissibility is not dependent on the person being available for cross-examination.

27.291 However, evidence of a preliminary complaint admitted under s 4A(2) is still only relevant to the complainant’s credibility so that juries in Queensland will be instructed that they cannot use the evidence as proof of the facts in issue, such as lack

unremarkable events, the distinct and complex nature of memory of violent crime indicates that the nature of the event concerned should be considered in deciding whether a memory is “fresh” at the relevant time. The assessment of “freshness” should not be confined to time: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, Uniform Evidence Law, Report 102, NSWLRC Report 112, VLRC FR (2005), [8.120].


364 The amending legislation in Tasmania (Evidence Amendment Bill 2008 (Tas)) had not been passed at the time of writing.

365 For a more comprehensive review of modification to the common law relating to recent and delayed complaint evidence, see: A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 141–145.
of consent.\textsuperscript{366} This means that Queensland has not abolished the common law recent complaint rule.

27.292 In Western Australia, a child-specific modification to the law on hearsay evidence was enacted in 1992.\textsuperscript{367} Under s 106H of the \textit{Evidence Act 1906} (WA), the admissibility of out-of-court statements is left to the discretion of the judge, and is dependent on the child being available for cross-examination. The aim of the provision is to allow any statement made by a child to another person to be admissible in certain criminal trials, including child sexual assault trials.

27.293 In South Australia, a child-specific hearsay exception was enacted, after the 2006 Chapman review of rape and sexual assault laws.\textsuperscript{368} A substituted s 34CA of the \textit{Criminal Law Consolidation Act 1935} (SA) was intended ‘to facilitate the proof of sexual offences against children’.\textsuperscript{369} The provision abolishes the recent complaint rule because out-of-court statements admitted under this provision can be used to prove the truth of the facts asserted.\textsuperscript{370}

\textbf{Evidence of delayed complaint}

27.294 Hearsay evidence has been considered unreliable because the maker of the statement could not be cross-examined about its veracity. The position at common law is that hearsay evidence of delayed complaint will not be admissible, unless this has been amended by specific legislation.

27.295 The hearsay exception under s 66(2) of the uniform Evidence Acts overcomes this problem because the maker of the statement (the complainant) is available to give evidence and to be cross-examined about the complaint as long as he or she is competent to give evidence. The relevance of evidence of delayed complaint ‘is not to compete with the quality of the complainant’s evidence but to illustrate the context in which she made her disclosure and the reasons for any delay’.\textsuperscript{371}

27.296 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault.\textsuperscript{372} Significantly in the context of this Inquiry, the ‘predictors associated with delayed disclosure’\textsuperscript{373} reveal differences in reporting patterns depending upon the victim’s relationship with the abuser. For

\begin{itemize}
\item \textsuperscript{366} \textit{R v RH} [2005] 1 Qd R; \textit{R v GS} [2005] QCA.
\item \textsuperscript{367} This provision was enacted to implement the recommendations of the Western Australian Law Reform Commission, \textit{Report on Evidence of Children and Other Vulnerable Witnesses} (1991). See also \textit{RPM v The Queen} [2004] WASCA, [46].
\item \textsuperscript{368} \textit{L Chapman, Review of South Australia Rape and Sexual Assault Law: Discussion Paper} (2006), prepared for the Government of South Australia.
\item \textsuperscript{369} \textit{South Australia, Parliamentary Debates}, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).
\item \textsuperscript{370} \textit{Criminal Law Consolidation Act 1935} (SA) s 34CA(3).
\item \textsuperscript{371} \textit{A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia} (2010), prepared for the National Child Sexual Assault Reform Committee, 147.
\item \textsuperscript{372} For a review of this literature see ibid, 86–97; \textit{D Lievore, Non-Reporting and Hidden Recording of Sexual Assault: An International Review} (2003), prepared for the Commonwealth Office of the Status of Women.
\item \textsuperscript{373} \textit{A Cossins, Alternative Models for Prosecuting Child Sex Offences in Australia} (2010), prepared for the National Child Sexual Assault Reform Committee, 89.
\end{itemize}
example, where the victim and defendant are related, research suggests there is a longer delay in complaint.\textsuperscript{374} Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, ‘it is likely that evidence about a complainant’s first complaint would answer the type of questions that jurors can be expected to ask themselves’.\textsuperscript{375}

27.297 In uniform Evidence Acts jurisdictions, s 66(2) will, in some cases, permit the admission of evidence of delayed complaint where the occurrence of the events was ‘fresh in the memory’ of the complainant. In other cases, the ‘fresh in the memory’ requirements will be a barrier to admissibility.

27.298 Evidence of delayed complaint may also be admissible under s 108 of the uniform Evidence Acts. The relevant part of this exception to the credibility rule\textsuperscript{376} provides that the credibility rule does not apply to evidence of a prior consistent statement of a witness if evidence of a prior inconsistent statement of the witness has been admitted; or there are suggestions that evidence given by the witness has been fabricated or reconstructed or is the result of a suggestion.\textsuperscript{377} That is, where delay in complaint is used to impugn the credibility of the complainant, s 108 can be used to admit evidence about the complaint including, for example, the reasons for the delay in complaint and the surrounding circumstances.

Problems with the operation of s 66

27.299 Some commentators have identified the operation of s 66 of the uniform Evidence Acts as a problem in relation to evidence of delayed complaint. This view has been summarised by the National Child Sexual Assault Reform Committee as follows:

Trial and appellate judges may consider that a complainant’s representation is unreliable because of their young age at the time it was made, or because too much time has elapsed between the events in question and the preliminary complaint. Because s 66(2A) does not actually change the ‘recent’ or ‘immediate’ requirement imposed by Graham’s case it is unlikely that the amendment will have the effect of admitting evidence of delayed complaint, as a matter of course.\textsuperscript{378}

27.300 One option to avoid the ‘fresh in the memory’ requirement would be to adopt the Queensland approach to evidence of delayed complaint. This would ensure that evidence of the content of, and the circumstances surrounding, a sexual assault complaint was admissible, regardless of the length of time between the complaint and the alleged sexual abuse. The Queensland approach recognises that the law has considered the time lapse between the assault and the making of a complaint as ‘evidence of truthfulness and fabrication, despite the fact that delay in complaint has been consistently found to be the most typical feature’ of sexual assault.\textsuperscript{379}

\textsuperscript{374} For example, see analysis in Ibid, 86–90.  
\textsuperscript{375} Ibid, 148.  
\textsuperscript{376} The rule that credibility evidence about a witness is not admissible: Uniform Evidence Acts, s 102.  
\textsuperscript{377} Ibid s 108.  
\textsuperscript{378} A Cousins, Alternative Models for Prosecuting Child Sex Offences in Australia (2010), prepared for the National Child Sexual Assault Reform Committee, 150.  
\textsuperscript{379} Ibid, 150.
Questions have been raised about whether ‘courts and judges are the appropriate forum and personnel to be making … assessments’ about the quality of a witness’ memory.  

If there are issues of reliability, options for reform could be to ensure that a complainant is available to be cross-examined about their out-of-court statements and that courts are able to give appropriate warnings to the jury.

**Submissions and consultation**

In the Consultation Paper, the Commissions asked whether federal, state and territory legislation should provide that, where complainants in sexual assault proceedings are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made.

Cossins submitted that because of ‘the different approaches in WA, Queensland, SA, Victoria and the [uniform Evidence Acts] to out-of-court disclosures made by a child about being sexually abused, there is a need to bring consistency to this area of evidence law’.

Cossins recommended that new provisions be inserted into s 66 of the uniform Evidence Acts providing that, if a person is a complainant in a child sexual assault trial and has been or is to be called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint given by that person or a person who saw, heard or otherwise perceived the preliminary complaint being made regardless of when the preliminary complaint was made. Common law evidence jurisdictions should, in her view, enact a provision based on that in Queensland, with modifications to overcome present limitations regarding the admissibility of evidence of a child’s complaint of sexual abuse.

A number of other stakeholders agreed that evidence of preliminary complaint should be more readily admissible. The Victorian Aboriginal Legal Service submitted that the hearsay rule should not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made. The NSW ODPP stated:

We are supportive of complaint evidence being admitted in the Crown case as part of the narrative to put the complainant’s actions in context, in line with the Queensland

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380 Ibid, 151.
381 Consultation Paper, Question 18–10.
382 A Cossins, Submission FV 112, 9 June 2010.
383 A preliminary complaint would be defined as any complaint other than the complainant’s first formal witness statement to a police officer or other qualified person given in relation to, or in anticipation of, criminal proceedings in relation to the alleged offence: Ibid.
384 Criminal Law (Sexual Offences) Act 1978 (Qld) s 4A.
provision, in all cases. In some cases, depending on the facts it may still be appropriate to admit the evidence as hearsay. 387

27.306 Other stakeholders opposed any special exception to the general rules of evidence applicable to preliminary complaints in sexual assault proceedings. 388 The Law Council agreed that ‘a general proposition that children often delay in making complaint does not make evidence of the complaint inherently more reliable than in-court evidence, the usual justification for exceptions to the hearsay rule’. 389 National Legal Aid submitted that allowing evidence of a disclosure to be admitted ‘as truth of the substance of that disclosure, in circumstances where the disclosure is lacking in detail and was made when the accuracy of the complainant’s recollection may already have been affected by the passage of time, would be improperly prejudicial to an accused’. 390

Commissions’ views

27.307 The Commission is not convinced that a strong enough case has been made for reform of s 66 of the uniform Evidence Acts to create an exception for the evidence of child or other complainants in sexual assault proceedings. The possibility of such a reform was considered, but not pursued, by the ALRC, the NSWLRC and VLRC in their 2005 report reviewing uniform evidence law. 391

27.308 It has been argued that the ‘fresh in the memory’ requirement under s 66 can mean that, for example, when a jury warning is given regarding the forensic disadvantage suffered by the defendant as a result of a delay in complaint, evidence of when the complaint was made, what was said and the reasons for delay may be ‘technically inadmissible in examination-in-chief’. 392

27.309 This can mean that evidence about the delay is left to the defence to raise during cross-examination, ‘leaving the jury with an inaccurate impression about the reasons for the complainant’s delayed disclosure and, unless addressed during re-examination, an incomplete account of why, when and how the complainant made her first complaint’. 393

27.310 One option to address these concerns would be for legislation to provide that, where complainants in sexual assault trials are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made. The mechanism for reform would be amendment of

393 A Cossins, Submission FV 112, 9 June 2010.
s 66 of the uniform Evidence Acts in those jurisdictions. In other jurisdictions, reforms could be enacted in criminal procedure legislation relating to sexual offences.

27.311 Such a reform may be criticised, however, for attempting to amend an exception to the hearsay rule to address concerns primarily about attacks on the credibility of complainants in sexual assault cases. The Consultation Paper noted that evidence of a long delayed complaint is not inherently more reliable than in-court evidence (the usual justification for exceptions to hearsay rule).\footnote{Consultation Paper, [18.223].} It can be seen as wrong in principle to retain s 66 generally, while creating a special exception for complainants in sexual assault proceedings.

27.312 Cossins submitted that this objection to reform of s 66 fails to ‘understand the importance and relevance of evidence of a child’s preliminary or first complaint’.\footnote{A Cossins, Submission FV 112, 9 June 2010.} In her view, it is necessary to recognise the value judgments used when assessing the relevance of such evidence. This value judgment should be:

- informed by the knowledge that children typically delay disclosure of sexual abuse [which] means that evidence of a child’s \textit{delayed} disclosure, together with the circumstances in which it was made and the trigger for the disclosure (for example, [disclosure] to the child’s mother when a child does not want to be baby-sat by the offender) satisfies the relevance test under s 55 of the [uniform Evidence Acts] because it rationally affects the assessment of the probability of the existence of a fact in issue, namely whether the accused committed the alleged sexual abuse.\footnote{Ibid.}

27.313 On the other hand, the hearsay rule is not concerned with the relevance of evidence, but with its reliability according to the proposition that the ‘best evidence available’ to a party should be received. The concept of ‘best available evidence’ can be seen to involve two elements—the quality of the evidence and its availability. Reasons to do with the quality of evidence led to a distinction being drawn between statements made while relevant events were ‘fresh in the memory’ and statements which were not.\footnote{See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, \textit{Uniform Evidence Law}, Report 102, NSWLRC Report 112, VLRC FR (2005), [7.10]–[7.13].}

27.314 Another factor dictating against a specific recommendation for reform is that there may not have been enough time to establish whether s 66(2A) of the uniform Evidence Acts has had any impact on the admission of evidence of delayed complaint.\footnote{Law Council of Australia, \textit{Submission FV 180}, 25 June 2010.} This amendment to the uniform Evidence Acts was intended, in part, to address ‘special difficulties’ with the ‘fresh in the memory’ criterion in sexual offence cases\footnote{Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, \textit{Uniform Evidence Law}, Report 102, NSWLRC Report 112, VLRC FR (2005), [8.75].} and only came into operation in January 2009.
27.315 The ALRC, VLRC and NSWLRC, in ALRC 102, recommended that in order to ensure the ‘maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts’, Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years from the tabling of the Report. This would be an appropriate time to review the operation of s 66(2A).

400 Ibid, Rec 2–3.