

Similar Fact Evidence CPD

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The background features a series of concentric circles in light grey, some solid and some dashed, creating a ripple effect. A thick, dark grey swoosh curves from the bottom left towards the center, partially overlapping the red oval.

What is “**similar fact**” or
“**propensity**” evidence?

Former position in Queensland

“... 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 consistent with the innocence of the accused ... Only if there is no such view can [the judge] safely conclude that the probative force of the evidence outweighs its prejudicial effect.”

***Pfennig v The Queen* (1995) 182 CLR 461 at 482–3 per Mason CJ, Deane and Dawson JJ.**

*“Probative force is another way to refer to the weight of evidence. Evidence is relevant if it makes a fact in issue either more or less probable. Weight of evidence, or probative value, is the degree of probability generated by the evidence. Evidence will have a prejudicial effect if there is a risk that the jury might use the evidence against the accused in a logically irrational manner. In *Pfennig*, McHugh J remarked that probative value and prejudicial effect are incommensurables. That is to say, they have no common standard of comparison. McHugh J observed that the real question that is posed is not whether probative value “outweighs” prejudicial effect but whether the interests of justice require the evidence to be admitted despite the risk of its misuse. Whether it is called a weighing of probative value against the risk of prejudice to the accused or whether it is called a consideration of the interests of justice, the task remains the same.”*

***R v McNeish* [2019] QCA 191 [56], Sofronoff P and Henry J discussed the concept of probative force:**

Legislative reform in Queensland

**New section 177 – *Evidence
Act***

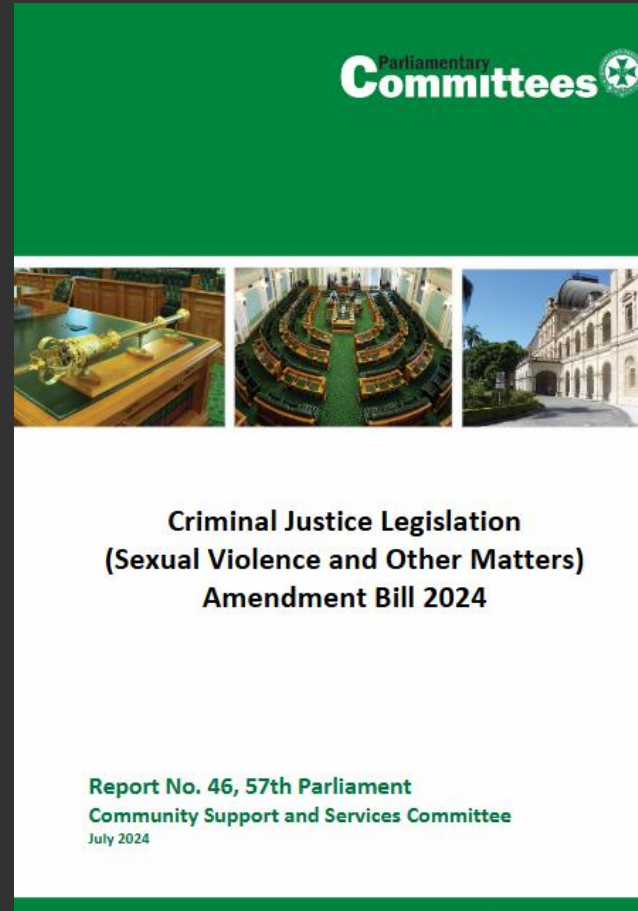
**Commencement on a date to be fixed
by proclamation**

***177 Tendency evidence and coincidence
evidence***

*Part 7A applies to a proceeding for an offence
committed before the commencement if an
originating step for the proceeding is taken on
or after the commencement.*

Background

- *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024*
- *Taskforce recommendation 75*



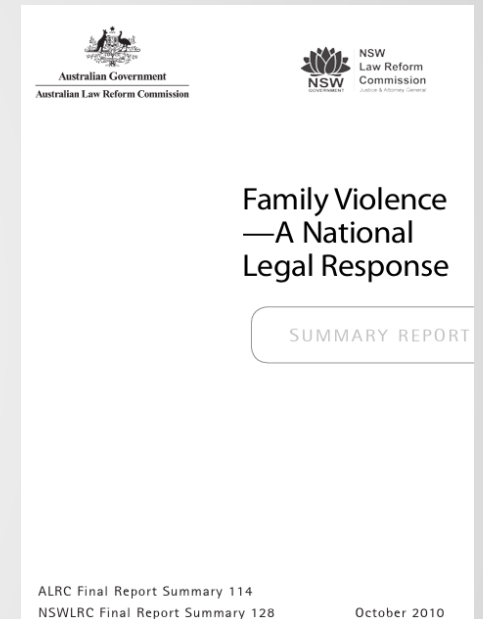
Recommendations preceding the findings of the Taskforce:

Child Abuse Royal Commission in 2015

- Recommended that legislative reform was required throughout Australia

Issue was examined by the Australian Law Reform Commission

- Recommendation 27-13



**What submissions
were made on these
changes by QLS, BAQ
and LAQ?**

- The Queensland Law Society (QLS) and Legal Aid Queensland (LAQ)
- Bar Association of Queensland
- Women's Legal Service Queensland (WLSQ)
- Knowmore
- Taskforce also considered accounts from victim-survivors



Other jurisdictions

SOUTH AUSTRALIA

34P—Evidence of discreditable conduct

- (1) *In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (**discreditable conduct evidence**)—*

 - (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and*
 - (b) is inadmissible for that purpose (**impermissible use**); and*
 - (c) subject to subsection (2), is inadmissible for any other purpose.*
- (2) *Discreditable conduct evidence may be admitted for a use (**the permissible use**) other than the impermissible use if, and only if—*

 - (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and*
 - (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.*
- (3) *In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.*
- (4) *Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.*
- (5) *The court may, if it thinks fit, dispense with the requirement in subsection (4).*

WESTERN AUSTRALIA

31A. Propensity and relationship evidence (WA Evidence Act)

(1) In this section —

propensity evidence means —

- (a) similar fact evidence or other evidence of the conduct of the accused person; or
- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —

- (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
- (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

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

QUEENSLAND - New Part 7A to the *Evidence Act*:

- 129AA Application
- 129AB Definitions for part
- 129AC Use of evidence for other purposes
- 129AD The tendency rule
- 129AE Admissibility of tendency evidence in proceedings involving certain child sexual offences
- 129AF The coincidence rule
- 129AG Requirements for notices
- 129AH Court may dispense with notice requirements
- 129AI Further restrictions on tendency evidence and coincidence evidence adduced by prosecution
- 129AJ Exceptions to tendency rule—evidence about character of an accused person
- 129AK Standard of proof for tendency evidence or coincidence evidence

Clause 41 omits section 132A (Admissibility of similar fact evidence).

132A Admissibility of similar fact evidence

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

Unchanged by these amendments

***597A Separate trials
where 2 or more charges
against the same person***

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

New provisions in detail

129AA Application

- (1) *This part applies to criminal proceedings.*
- (2) *Despite subsection (1), this part does not apply to—*
 - (a) *bail or sentencing proceedings; or*
 - (b) *evidence that relates only to the credibility of a witness; or*
 - (c) *evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, to the extent that the character, reputation, conduct or tendency is a fact in issue.*
- (3) *To avoid doubt, any principle or rule of the common law that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this part to tendency evidence or coincidence evidence about a defendant.*
- (4) *In determining the probative value of tendency evidence or coincidence evidence for the purpose of this part, it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.*

129AB Definitions for part

(1) In this part—

coincidence evidence—

- (a) means evidence that 2 or more events occurred that is adduced or to be adduced to prove, that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally; and
- (b) includes evidence from multiple witnesses claiming to be victims of offences committed by a defendant, that is adduced or to be adduced to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue.

probative value, of evidence, means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

tendency evidence means evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, that is adduced or to be adduced to prove that a person has or had a tendency, whether because of the person's character or otherwise, to act in a particular way or to have a particular state of mind.

tendency rule means the rule of evidence expressed in section 129AD(1).

(2) A reference in this part to an act includes a reference to an omission.

129AC Use of evidence for other purposes

(1) Evidence that under this part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this part can not be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

129AD *The tendency rule*

(1) *of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency, whether because of the person's character or otherwise, to act in a particular way, or to have a particular state of mind unless—*

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and*
- (b) the court considers that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.*

(2) *Subsection (1)(a) does not apply if—*

- (a) the evidence is adduced in accordance with any directions made by the court under section 129AH; or*
- (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.*

Note—

The tendency rule is subject to specific exceptions concerning the character of, or expert opinion about, accused persons, see section 129AJ. (Other provisions of this Act may also operate as further exceptions.)

129AF *The coincidence rule*

(1) *Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless—*

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and*
- (b) the court considers that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.*

Note— One of the events referred to in this subsection may be an event the occurrence of which is a fact in issue in the proceeding.

(2) *To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.*


(3) *Subsection (1)(a) does not apply if—*

- (a) the evidence is adduced in accordance with any directions made by the court under section 129AH; or*
- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.*

129AE

Admissibility of tendency evidence in proceedings involving certain child sexual offences

- (1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.*
- (2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 129AD(1)(b) and 129AI(1)*
 - (a) tendency evidence about the sexual interest the defendant has or had in children, even if the defendant has not acted on the interest;*
 - (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.*
- (3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.*
- (4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.*



(5) The following matters are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters to warrant taking them into account—

(a) the sexual interest or act to which the tendency evidence relates (the tendency sexual interest or act) is different from the sexual interest or act alleged in the proceeding (the alleged sexual interest or act);

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred;

(c) the personal characteristics of the subject of the tendency sexual interest or act, for example, the subject's age, sex or gender, are different to those of the subject of the alleged sexual interest or act;

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act; (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features;

(g) the level of generality of the tendency to which the tendency evidence relates.

(6) In this section—

child means a person under 16 years of age.

relevant child sexual offence—

means an offence of a sexual nature committed in relation to a child under 16, including an offence against a provision of the Criminal Code, chapter 22 or 32; but

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

Amendment of sch 3 (Dictionary)

Schedule 3

Insert -

child sexual offence *means an offence of a sexual nature committed in relation to a child, including an offence against a provision of the Criminal Code, chapter 22 or 32.*

129AG

Requirements for notices

(1) A notice given under section 129AD(1)(a) or 129AF(1)(a) must be given in accordance with any requirement prescribed by regulation.

(2) To remove any doubt, it is declared that a regulation may prescribe a minimum notice period for the purpose of section 129AD(1)(a) or 129AF(1)(a).

129AH

Court may dispense with notice requirements

- (1) *The court may dispense with the requirement to give notice under section 129AD(1)(a) or 129AF(1)(a) as the case may be—*

 - (a) on the application of a party; or*
 - (b) on its own initiative if the court considers it appropriate to do so.*
- (2) *To remove any doubt, it is declared that an application under subsection (1) may be made before or after the time that notice would otherwise be required to be given.*
- (3) *A direction under subsection (1) may be—*

 - (a) subject to any conditions the court thinks fit; and*
 - (b) given at or before the hearing in which the evidence is to be adduced.*
- (4) *Without limiting the court's power to impose conditions under this section, those conditions may include 1 or more of the following—*

 - (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;*
 - (b) a condition that the party give notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;*
 - (c) a condition that the party give notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.*

Regulations 5 & 6 of the Evidence Regulations 2020 (NSW):

5 Notice of tendency evidence

- (1) *A notice given under section 97(1)(a) of the Act (a **notice of tendency evidence**) must be given in accordance with the requirements of this clause.*
- (2) *A notice of tendency evidence must state—*
 - (a) *the substance of the evidence to which the notice relates, and*
 - (b) *if that evidence consists of, or includes, evidence of the conduct of a person, particulars of—*
 - (i) *the date, time, place and circumstances at or in which the conduct occurred,*
 - (ii) *the name of each person who saw, heard or otherwise perceived the conduct, and*
 - (iii) *in a civil proceeding—the address of each person so named, so far as it is known to the notifying party.*
- (3) *On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.*
- (4) *The direction may be given on any terms that the court thinks fit.*

6 Notice of coincidence evidence

- (1) A notice given under section 98(1)(a) of the Act (a **notice of coincidence evidence**) must be given in accordance with the requirements of this clause.
- (2) A notice of coincidence evidence must state—
 - (a) the substance of the evidence of the occurrence of 2 or more events that the party giving the notice intends to adduce, and
 - (b) particulars of—
 - (i) the date, time, place and circumstances at or in which each of those events occurred, and
 - (ii) the name of each person who saw, heard or otherwise perceived each of those events, and
 - (iii) in a civil proceeding—the address of each person so named, so far as it is known to the notifying party.
- (3) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of coincidence evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.
- (4) The direction may be given on any terms that the court thinks fit.

- **In *R v Zhang*, Simpson J. said that a properly drafted coincidence notice would identify four matters:**

1. the two or more related “events” the subject of the proposed evidence;
2. the person whose conduct or state of mind is the subject of the proposed evidence;
3. whether the evidence is to be tendered to prove that a person did a particular act, and, if so, what that “act” is;
4. whether the evidence is to be tendered to establish that that person had a particular state of mind, and, if so, what that “state of mind” is.

- ***R v An* (2000) 117 A Crim R 176**

- ***R v Batak (No 2)* [2022] NSWSC 425**

129AI

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution can not be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.*
- (2) However, this section does not apply to—*
 - (a) tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant; or*
 - (b) coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.*

Assessing probative value & prejudicial effect

Pfennig v The Queen (1995) 182 CLR 461

Papakosmas v The Queen (1999) 196 CLR 297

R v McNeish QR 355

R v LBE [2024] QCA 53

R v Newman [2020] QCA 92

129AJ *Exceptions to
tendency rule—
evidence about character of an
accused person*

- (1) *The tendency rule does not apply to—*
 - (a) *evidence adduced by a defendant to prove, directly or indirectly, that the defendant is, generally or in a particular respect, a person of good character; or*
 - (b) *evidence adduced to refute evidence of the kind referred to in paragraph (a).*
- (2) *The tendency rule also does not apply to—*
 - (a) *evidence of the defendant's character adduced by another defendant if—*
 - (i) *the evidence is an opinion about the defendant; and*
 - (ii) *the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and*
 - (iii) *the opinion is wholly or substantially based on that knowledge; or*
 - (b) *if evidence of the kind referred to in paragraph (a) is admitted, evidence adduced to prove that that opinion evidence should not be accepted.*

129AK
***Standard of proof for tendency
evidence or coincidence
evidence***

- (1) Tendency evidence or coincidence evidence need not be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence unless—
 - (a) the court is satisfied that there is a significant possibility that the jury will rely on the evidence as being essential to its reasoning in reaching a finding of guilt; or*
 - (b) the evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge.**
- (2) If tendency evidence or coincidence evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge, the evidence need only be proved beyond reasonable doubt to the extent that it is adduced as proof of the element or essential fact*

103CB
Evidence of domestic violence

(1) Relevant evidence of domestic violence is admissible as evidence in a criminal proceeding

(2) Without limiting subsection (1), the evidence of domestic violence may relate to—

(a) the defendant; or

(b) the person against whom the offence was committed; or

(c) another person connected with the proceeding.