

# Tendency Evidence in 2020

Nicholas Broadbent and Derek Buchanan

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## Introduction

1. The purpose of this paper is to set out recent amendments to the law of tendency evidence in New South Wales. The amendments to both evidence and criminal procedure, which in large part came into force following the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) and the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*, substantially affect the law as it pertains to tendency, and in particular child sexual assault matters. However, it is to be noted that the amendments do not substantially alter the existing High Court authority in relation to other cases where tendency evidence is to be adduced. In this paper, we endeavour to summarise several “key” High Court authorities which preceded the amendments to the *Evidence Act 1995* (NSW) (“the Act”). We will then summarise this year’s amendments, which broaden the scope for admissibility of tendency evidence, particularly in cases involving allegations of child sexual assault. We also provide an update of recent Court of Criminal Appeal cases which highlight the growing prevalence of tendency evidence in these kinds of matters.
2. Despite substantial changes, it is suggested that because the major amendments are confined to child sexual assault cases, arguments against the admission of tendency evidence in cases which do not involve child sexual assault remain available and viable.

### **Significant probative value under s 97 Evidence Act 1995**

3. The admission of tendency evidence is governed by Part 3.6 of the Act. The first step requires reasonable notice to be given: s 97(1)(a). Section 97(1)(b) requires the court to find that the evidence will, either by itself or having regard to other evidence, have “significant probative value”. Assuming significant probative value is established, in criminal proceedings, the evidence must satisfy s 101, which will be discussed below. Summarising the judicial approach to tendency reasoning, Simpson J in *Gardiner v R* (2006) 162 A Crim R 233, 260 stated at [125]:

“Where tendency evidence is tendered, the judicial process involves:

- a. determining whether the evidence has probative value; that is, determining whether it is capable rationally of affecting the assessment (by the tribunal of fact) of the probability of a fact in issue;
  - b. if it is determined that the evidence is so capable (and therefore has probative value), determining whether that probative value is capable of being perceived by the tribunal of fact as significant...;
  - c. (in a criminal case) if it is determined that the evidence is capable of being so perceived, applying the s101(2) test..."
4. More recently, a slightly different four-step summary was provided by the Court of Appeal of the Supreme Court of Victoria in *Dempsey (a Pseudonym) v The Queen* [2019] VSCA 224 at [59]. Common to all approaches is that the significant probative value threshold must be crossed before there is any weighing exercise involving the assessment of the prejudicial effect of the evidence.
5. Significant probative value is dealt with under s 97(1) of the Act, which is in the following terms:
  - (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless--
    - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
    - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
  - (2) Subsection (1) (a) does not apply if--
    - (a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

6. "Probative value" is defined in the Dictionary to the Act to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". Probative value is to be assessed by reference to what the evidence is capable of proving, taking it at its highest: *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14 at [49]-[54] (per French CJ, Kiefel, Bell and Keane JJ); *R v Bauer* [2018] HCA 40; 359 ALR 256; 271 A Crim R 558 at [69]. While the determination of probative value excludes consideration of credibility and reliability unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence.
7. "Significant" means "important" or "of consequence": *R v Lockyer* (1996) 89 A Crim 457; *DSJ v The Queen* [2012] NSWCCA 9; 84 NSWLR 758 at [58] and [60]. Evidence must be of such a nature that it could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent — that is, more than is required by s 55 of the Act to establish relevance — *Hughes v The Queen* (2017) 92 ALJR 52; 344 ALR 187 at [16]; *McPhillamy v The Queen* (2018) 92 ALJR 1045 at [27]; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73].
8. In *Hughes v The Queen* (2017) 92 ALJR 52 at 66 [41]; 344 ALR 187 at 199; [2017] HCA 20, the majority considered that the assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters:
  - a. the extent to which the evidence, by itself or together with other evidence, supports the tendency; and
  - b. the extent to which the tendency makes more likely the facts making up the charged offence.
9. The majority said that the two-stage consideration makes it "easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or

"modus operandi"." To that end, it is useful to set out the majority's reasoning in *Hughes* at [39]-[40] in full:

"Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that any conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case. The test posed by s 97(1)(b) is as stated in *Ford*: "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged". The only qualification to this is that it is not necessary that the disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. Of course, where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible."

10. Nettle J (although in dissent) stated in *Hughes* at [154], that “[e]vidence that an accused has committed an offence is not, of itself, significantly probative of the accused having committed another offence ... To make evidence of previous offending or misconduct significantly probative of a subsequent offence there needs to be something more about the nature of the offences or the circumstances of the offending in each case, or about the victim of each offence, which rationally affects to some significant degree the assessment of the probability that the accused committed the offence...”.
11. Per *Hughes*, the admission of tendency evidence is not conditioned upon the court's assessment of operative features of similarity with the conduct in issue and there is no statutory requirement for courts to identify ‘underlying unity’. However, that is not a basis to discount fundamental differences in the nature of the conduct, the distinction between acts and a state of mind and the individuals involved when considering the issue of significant probative value, nor does it provide a warrant to ignore the absence of any factual links between the charged matters and the asserted tendency events. Those matters remain highly relevant to the determination. Appellate discussion following *Hughes* supports that notion.
12. In *McPhillamy*, the *Hughes* approach was considered and applied by the majority (Kiefel CJ, Bell, Keane and Nettle JJ) and separately by Edelman J (setting out additional reasons for his Honour’s agreement with the majority). The majority emphasised that certain tendency evidence in the case did tend to establish a tendency to have a sexual interest in young teenage boys, which their Honours characterised as a “particular state of mind” that was “likely to be enduring” (at [26]). However, such a state of mind was unlikely to have significant probative value to prove that the appellant acted on it, especially where significant time (in that case, a decade) had passed. At [27], the majority said (emphasis supplied):

“Proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value.”

13. Proof of past offending against other complainants was not capable of affecting the assessment of the likelihood that the appellant committed the offences against the complainant “A” to a significant extent. The majority considered that the evidence of tendency rose no higher than to insinuate that, because the appellant had sexually offended against two other complainants ten years before, in different circumstances, and without any evidence other than complainant “A’s” allegations that he had offended again, he was the kind of person who was more likely to have committed the offences that “A” alleged: at [32]. The majority considered that the evidence did not pass the s 97 threshold.
14. Edelman J, writing separately and deploying the two-stage approach in *Hughes*, considered the probative value to be low: at [35]-[39].
15. In *Bauer* at [58], the Court examined the issue of significant probative value and discussed cases involving single as well as multiple complainants, stating:

“In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.”

16. In *Bauer*, the High Court’s approach distinguished between acts committed in respect of a single complainant, and those involving multiple complainants. In the former situation, uncharged acts may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant, whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM*, or exhibit a special, particular or unusual feature of the kind described in *Hughes*.
17. The basis of cross-admissibility of evidence of charged acts and uncharged acts in cases where the conduct is not too far separated in time and the conduct is of a similar nature, rests on the “very high probative value” of that kind of evidence resulting from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, s/he will seek to gratify his or her sexual attraction by engaging in sexual acts of various kinds with that person: *Bauer* at [50]–[51], [60]; see also *HML v The Queen* (2008) 235 CLR 334 at [109]. In instances where there are acts alleged to have been perpetrated against multiple complainants, the need for something more by way of a special, particular or unusual feature remained.

***Evidence Amendment (Tendency and Coincidence) Act 2020***

18. The Royal Commission into Institutional Responses to Child Sexual Abuse found in respect of tendency evidence that:

“The probative value of the tendency or coincidence evidence – or the extent to which the tendency or coincidence evidence makes the complainant’s evidence more likely to be true – may depend upon a range of factors, including similarities between the occasions or nature of the abuse, similarities between the victims of abuse, how close in time the occasions of abuse occurred, whether there were any distinctive features of the abuse or its circumstances and the like.

...

But even with no similarities beyond the incidents involving acts of child sexual abuse, it should be obvious that the evidence would still have significant probative value in

those cases where the identity of the accused is not in issue... The two most important similarities are already present – sexual offending against a child.”<sup>1</sup>

19. The Royal Commission concluded:

“tendency or coincidence evidence generally has significant probative value in prosecutions for child sexual abuse offences (particularly where it is not being relied on to identify the accused). Given our understanding of the probative value of tendency and coincidence evidence in child sexual abuse prosecutions, a test of ‘significant probative value’ should not often exclude such evidence.”<sup>2</sup>

20. The *Evidence Amendment (Tendency and Coincidence) Act 2020* (The ‘2020 Amendment’) commenced on 1 July 2020. The 2020 Amendment is, in large part, a legislative response to the Royal Commission’s findings. Its impact upon the admissibility of tendency evidence in child sexual assault cases is substantial.

#### Transitional Provisions

21. In considering whether the 2020 Amendment applies to a case, close attention should be paid to the transitional provisions, which can be found in Part 6 of Schedule 2 of the *Evidence Act*. Item 28 of the Schedule states that the amendment “does not apply in relation to proceedings the hearing of which began before the commencement of the amendment”. The timing of the “hearing” of the “proceedings” will dictate whether the amendment applies. In the Dictionary to the Act, “proceedings” is not defined, but “criminal proceeding” means a prosecution for an offence and includes (a) a proceeding for the committal of a person for trial or sentence for an offence, and (b) a proceeding relating to bail. In criminal cases, if the meaning of “proceeding” under the 2020 Amendment is a “criminal proceeding”, then any “hearing” before its commencement would mean that the 2020 Amendment has no application to the proceedings. In the Second Reading Speech, the Attorney General said:

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<sup>1</sup> Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts III-VI, page 594-595.

<sup>2</sup> Royal Commission into Institutional Response to Child Sexual Abuse, Criminal Justice Report, August 2017, Parts III-VI, page 639.

“The intent of the transitional provisions is that, first, in the case of a summary proceeding, the reforms will not apply to matters in which a court attendance notice was filed prior to the commencement of the reforms; and, secondly, in the case of a trial heard on indictment, the reforms will not apply to matters in which an indictment has been presented and the accused person has been arraigned prior to the commencement of the reforms.

The reforms will apply in circumstances where a court attendance notice has been filed in respect of an offence that will be heard on indictment but where the indictment has not yet been presented and the accused person has not been arraigned. I note that this intent is consistent with the decision of the Court of Criminal Appeal in *GG v Regina* [2010] NSWCCA 230. In that decision, which considered the 2007 transitional provisions, the Court of Criminal Appeal held that:

“There is no doubt that the presentment of the indictment and arraignment of the accused person marks the commencement of the trial.”

The purpose of the transitional provisions is to prevent the reforms impacting a proceeding, the hearing of which has already commenced. The text at proposed clause 28(1), which provides that an amendment made to the Evidence Act by the bill "does not apply in relation to proceedings the hearing of which began before the commencement of the amendment", is intended to mean that the amendments in the bill will not affect criminal proceedings that have commenced, first, in the Local Court in the case of a summary hearing; or, secondly, in the District or Supreme courts in the case of a trial on indictment.”

## Section 97A

22. The 2020 Amendment adds a new s 97A to the Act. Section 97A states:

(1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.

(2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2)--

(a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest),

(b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

(3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.

(4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.

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

(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,

(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 18 years of age.

"child sexual offence" means each of the following offences (however described and regardless of when it occurred)--

(a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence, or

(b) an offence against, or arising under, a law of this State involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence, or

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

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

23. To summarise, s 97A(2) creates a presumption that tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest), or about the defendant acting on a sexual interest the defendant has or had in children, is presumed to have significant probative value in proceedings relating to sexual offending against a child or children.
24. The presumption under s 97A(2) will apply whether or not the sexual interest or act was directed at a complainant in the proceeding, any other child or children generally: s 97A(3).
25. The presumption recognises that:
  - a. Such tendency has a link or connection with child sexual offence charges irrespective of any other particular similarities between tendency evidence and charged acts: Second Reading Speech pp. 3-4.
  - b. Evidence of a sexual interest in a particular child is presumed to demonstrate or show that a person has a sexual interest in children generally (cf. *McPhillamy* at [27], *Bauer* at [58]): Second Reading Speech pp. 3-4.
26. A degree of judicial discretion is retained, arising under s 97A(4). For the presumption of significant probative value under s 97A(2) to be rebutted, there must be “sufficient grounds” for the court to find that the evidence does not have significant probative value: s 97A(4). If sufficient grounds are identified, then the evidence would be excluded under the first limb of s 97.
27. The legislation is silent as to what might constitute “sufficient grounds”. However, in determining whether there are sufficient grounds, s 97A(5) lists seven factors which are *not* to be taken into account unless the court considers there are “exceptional circumstances”. These factors demonstrate a response in the wake of the Royal Commission to the conclusion, per *Bauer* at [58], that “logical probability” dictates that there must be some feature of or about the offending behaviour linking the acts. On

any view, these prohibitions remove many of the usual bases for defence argument that there is no logical link. As the Council of Attorneys-General *Admissibility and Coincidence Evidence Working Group July 2019 Report* noted, “[t]he list is, in essence, underpinned by the Royal Commission’s view that such evidence generally has significant probative value “even with no similarities beyond the incidents involving acts of child sexual abuse””.

28. It is unclear what the “exceptional circumstances” might include which would lead a court to apply the matters listed in s 97A(5) of the Act, notwithstanding the legislative prohibition. The words “exceptional circumstances” appear elsewhere in criminal statutes, e.g. ss 22 and 22A *Bail Act 2013* (NSW), but it is not clear to us what guidance can be obtained, if any: see *El Khouli v R* [2019] NSWCCA 146.
29. Section 97A, and in particular, subsections (2) and (3), purports to remove any primacy given to similar acts (rather than interests not necessarily acted upon) as set out in *Hughes* and *McPhillamy*. The provision also removes the single/multiple complainant distinction by applying a presumption of significant probative value 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. However, s 97A only applies to child sexual assault matters. This limits the extent to which High Court authority is modified or cast aside by the statutory scheme.
30. Undoubtedly, tendency arguments in the criminal law often arise in the context of child sexual offences, and the recent leading cases on the law of tendency in the High Court reflect this. However, several propositions gleaned from the High Court reasons in *Hughes*, *Bauer* and *McPhillamy* remain arguable in cases which do not involve child sexual assault. Ideas for the argument can be harvested from the s 97A(5) prohibitions themselves (because these remain valid bases for objection in cases not involving child sexual assault). Some other thoughts include:
  - a. In considering significant probative value in a particular case, per *Hughes* and *McPhillamy*, there is a distinction between “acts” and interests, desires or proclivities (conveniently, but perhaps incompletely, encapsulated by the phrase

“state of mind”). The effect of the distinction between acts and states of mind is that a court will more readily find significant probative value where the prosecution demonstrates there is a tendency to act.

- b. Similar to a situation where there are multiple complainants in a sexual assault matter (as distinct from a single complainant), in cases not involving sexual assault where there is asserted evidence of the tendency by the accused to do a particular act or have a “state of mind” targeting or involving individuals other than the alleged victim (whether those people are deceased or not), then some special, particular or unusual feature must be shown and there must be a sufficient temporal connection: *Bauer, IMM and Hughes*.
  - c. In relation to (b), context (and perhaps expert evidence) is important. For instance, where there is a single murder victim, a general homicidal interest or a desire to kill multiple people should not lightly be inferred from an accused’s prior acts. Conversely, a deviant sexual interest towards a class of people and a tendency to act upon that, as can be seen from the preponderance of tendency cases in the area, is demonstrably more common in the community and was the clear target of parliamentary concern in the wake of the Royal Commission into Institutional Responses to Child Sexual Abuse. That difference may well be one reason for the enactment of s 97A in its present form. Had Parliament intended to implement a regimen of presumed cross-admissibility between multiple complainants or targets of particular acts, or to create a presumption of a “general tendency” to act or think in a particular way in criminal cases not involving child sexual assault, it would have drafted s 97A much more broadly.
31. Therefore, in cases where a 97A does not apply, it would be expected that the “special feature” principle enunciated in *Bauer, IMM and Hughes* should be applied rigorously where the prosecution seeks to adduce evidence of tendency arising from alleged conduct by the accused against a person other than the complainant or alleged victim.

## Section 94

32. The 2020 Amendment, relevantly, amends s 94 to insert after section 94(3):

(4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant.

(5) In determining the probative value of tendency evidence or coincidence evidence for the purposes of section 97(1)(b), 97A(4), 98(1)(b) or 101(2), it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.

33. The inclusion of s 94(4) under the 2020 Amendment does not restrict the application of the above principles to be applied in respect of s 97 (or, for that matter, s 101). In the Second Reading Speech, the Attorney General said:

“Proposed section 94(4) ... seeks to put beyond doubt that any principle or rule of common law or equity preventing or restricting the admissibility of this kind of evidence is not relevant when applying part 3.6 of the Evidence Act. This provision would implement royal commission recommendation 46, which states:

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

The implementation of this recommendation is not intended in any way to indicate that any principle or rule of common law or equity should be considered in the application of other parts of the UEL, except as provided for by the Evidence Act.”

34. The words “To avoid doubt”, at the beginning of s 94(4) may be optimistic. The “principles” and “rules” are not defined. Whatever may be its purpose, s 94(4) could not be construed so broadly as to exclude the High Court’s recent construction of the meaning of “significant probative value”, particularly in cases where s 97A is not

enlivened. It is unlikely to displace judicial comparison of the “acts” and “states of mind” in the cases described above, nor does it impact the two-staged consideration of whether tendency evidence can be said to possess “significant probative value”. To read s 94 of the Act in such an expansive fashion would render the s 97 threshold meaningless.

### Section 101

35. Section 101 of the Act applies in criminal cases, applying “further restrictions” upon the prosecution in seeking to adduce tendency evidence about a defendant. It is the second matter for consideration, assuming the evidence has significant probative value. In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Act imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused.
36. Prior to the 2020 Amendment, s 101(2) stated:

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
37. In *Hughes* at [17], the majority pointed out that the reception of tendency evidence may cause prejudice in a number of ways. The jury “may fail to allow that a person who has a tendency to ... act in a particular way ... may not have acted in that way” on the occasion in issue or they “may underestimate the number of persons who share the tendency to ... act in that way”. The majority pointed to the fact that, in either of such cases, the tendency evidence may be given “disproportionate weight”.
38. The majority also pointed out that, in addition to “the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury’s emotional response to the tendency evidence”: see also the remarks of Gageler J at [72]-[74].

39. The 2020 Amendment amended s 101(2) of the Act by omitting the words “the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant” from s 101(2) and instead inserting the words “the probative value of the evidence outweighs the danger of unfair prejudice to the defendant”.

40. Section 101(2) now reads:

Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

41. While the removal of the word ‘substantially’ affects the weighing exercise that a court is required to undertake, the change of the words from “outweighs any prejudicial effect it may have on the defendant” to “outweighs the danger of unfair prejudice to the defendant” is perhaps less significant. It does no more than bring the wording into line with the words contained in s 137 of the Act. Prior to the 2020 Amendment, the Court of Criminal Appeal considered that following the application of ss 97 and 101 to tendency evidence, there was no room for the operation of either ss 135 or 137: *R v Ngatikaura* (2006) 161 A Crim R 329 at [70]–[71], [74] per Simpson J. Cases such as *R v Ford* (2010) 201 A Crim R 451 at [59] have made it clear that, once evidence has passed the test imposed by s 101(2), it was not possible to think of circumstances in which the evidence could be rejected pursuant to s 137.

42. As the High Court said in *Bauer* at [73] considering the previous iteration of s 101 when compared to the words used in those exclusionary provisions under Part 3.11 of the Act:

“Despite textual differences between the expressions “prejudicial effect” in s 101, “unfairly prejudicial” in s 135 and “unfair prejudice” in s 137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way.” (Citation omitted)

43. In the Second Reading Speech in the Legislative Assembly, the Attorney General said:

“Item 1 [4] to the bill replaces the term "any prejudicial effect it may have on the defendant" with "the danger of unfair prejudice to the defendant". Although the existing form of words is understood to refer to unfair prejudice, the proposed provision would mirror the formulation of section 137 of the Evidence Act, which sets out the test for when prejudicial evidence must be excluded in criminal proceedings.  
...

The High Court recently held that the expressions "prejudicial effect" in section 101 and "unfair prejudice" in section 137 convey essentially the same idea of harm to the interests of the accused by reason of a risk that a jury will use the evidence improperly in some unfair way. The reform would align the language of the provisions with the consistent interpretation.”

44. Notwithstanding the change in language, per *Bauer* and the Second Reading Speech, the new s 101, at least on the issue of prejudice, does not represent a major departure from the old provision. The only change to the weighing exercise is the removal of the requirement that the probative value of the evidence “substantially” outweighs the prejudice. However, it must be stressed that s 101 is to be considered only once the court is satisfied that the tendency evidence has significant probative value.
45. As Leeming JA held in *El-Haddad v R* [2015] NSWCCA 10; 88 NSWLR 93 at [82], s 101 will apply “with much greater force when the only way in which evidence is said to be relevant is because of tendency or coincidence reasoning (for example, a sexual assault case where evidence is called of another complainant in respect of whom no charges have been laid).”

**Procedural amendments: *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020***

46. There are a number of recent changes to the *Criminal Procedure Act 1986* concerning tendency evidence which warrant brief discussion, pursuant to the *Stronger Communities Legislation Amendment (Miscellaneous) Act 2020*. The amendments do not apply to proceedings the hearing of which began before commencement of the

amendments on 27 October 2020, with the exception of s 161A *Criminal Procedure Act*, which will come into effect on 21 March 2021.

47. Section 29A *Criminal Procedure Act* creates a presumption in favour of joint trials where a defendant has been charged with multiple offences and the prosecution intends to rely on tendency or coincidence evidence: s 29A(1). The presumption, which applies to all criminal proceedings (not just child sexual offences) is rebuttable and remains subject to s 21(2) *Criminal Procedure Act*, which provides the court with discretion to separate counts to ensure a fair trial.
48. Section 161A(1) *Criminal Procedure Act* clarifies that a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent it is adduced as tendency or coincidence evidence. This amendment appears to conform with existing High Court authority: in *Bauer* at [86], the High Court stated that juries should not ordinarily be directed that they could not act on evidence of uncharged acts unless they were satisfied those acts were proved beyond reasonable doubt. We do note that in contrast to *Bauer*, in *Jackson v R* [2020] NSWCCA 5 (discussed below) at [67]-[68], Price J in the Court of Criminal Appeal considered the trial judge's decision to give a direction of this kind not to constitute an error in circumstances where the defence had argued (perhaps unusually) that an error had been made. Price J stated that "[i]t is not entirely clear whether the High Court's statement as to the standard of proof was intended to be confined to single complainant sexual assault trials." His Honour considered that it was not an appropriate vehicle to finally decide the point. The remaining members of the Court declined to decide the issue. It seems to us that s 161A clarifies the position across the board, in all cases where tendency evidence is adduced.
49. Section 161A(3) states that s 161A(1) does not apply if (a) there is a significant possibility that a jury will rely on an act or omission as being essential to its reasoning in reaching a finding of guilt, and (b) evidence of the act or omission has been adduced as tendency evidence or coincidence evidence. In other words, a direction in accordance with *Shepherd v The Queen* (1990) 170 CLR 573 can still be given (see *Bauer* at [86]).

## Relevant Tendency Cases since IMM, Hughes, Bauer and McPhillamy

50. Appellate review is yet to scrutinise the new provisions. Because s 97A of the Act alters the approach in child sexual assault cases, caution should be taken by practitioners seeking to glean general principles from the cases cited below, even in relation to very recent decisions. It is worthwhile considering the below decisions hypothetically, through the lens of the new amendments. We make the empirical observation from our review of these authorities that, at an appellate level at least, the vast majority of arguments that tendency evidence should have been excluded have not succeeded. The new amendments are likely to make these arguments even more difficult. It is worth considering, for instance, what the outcome might have been in *McPhillamy* had it been decided under the new legislative regimen.

### Child Sexual Assault

*DS v R* [2018] NSWCCA 195

51. In *DS*, the appellant was tried before a judge and jury and convicted of one count of homosexual intercourse with a male person under the age of 10 years, contrary to s 78H *Crimes Act 1900* (NSW). The complainant was the appellant's nephew and was 9 years of age at the relevant time. The appellant was 18 years of age at the relevant time.
52. At trial, the Crown was permitted, over objection, to lead evidence of previously charged acts by the appellant against his niece, as tendency evidence. The niece provided evidence that on two or three occasions, when she was approximately 4 years of age, the appellant, then approximately 13 years of age, made her touch his penis.
53. This conduct had been the subject of a summary trial in the Local Court years later, when the appellant was over 21 years of age, and he was found not guilty because the prosecution could not rebut the presumption of *doli incapax*; the conduct constituting the *actus reus* was not disputed.
54. At trial, the defence argued that, *inter alia*, for the Crown to rely on the conduct in respect of the appellant's niece as tendency evidence, the acquittals in respect of that conduct would be controverted. The Crown, on the other hand, argued that the

principle of incontrovertibility had not been breached because the tender of the evidence did not tend to call into question the earlier acquittals.

55. Wilson J, with whom Basten JA and Lonergan J agreed, ultimately concluded that the Crown had breached the incontrovertibility principle that reflects the importance of finality of court verdicts and the unfairness involved in further litigating conduct in respect of which a person has been acquitted. Her Honour upheld the conviction appeal, quashed the conviction and remitted the matter to the District Court.
56. Her Honour did not go so far, however, as to decide that the evidence in respect of the niece was inadmissible as tendency evidence. Rather, her Honour commented on how the Crown framed its tendency notice and its contention that the appellant had a tendency to sexually assault young child relatives. This went beyond what the prior conduct could ever establish, given the acquittals on the basis of *doli incapax*. The ratio is summarised at [99]:

“Tendency evidence carries with it, by its very nature, a risk of prejudice to an accused person. Because of that risk it is important to be careful about the language used to describe the tendency argued for, and the way in which the evidence is to be used. Here, the evidence connected with the appellant’s conduct towards BS was capable of supporting a conclusion that he had a tendency to have a sexual interest in young children of his siblings, and a tendency to engage in sexual acts with them, but it could not support the existence of a tendency “to sexually assault young relatives.”

57. While agreeing with Wilson J in all material respects, Basten JA, at [7] provided the following additional observation that is apposite for all who grapple with tendency evidence:

“The operation of s 97 has caused difficulty, not least because of the vagueness of its language and the absence of any standard or criterion of admissibility beyond the evidence having significant probative value. Apart from the practical consideration that leading evidence of conduct on other occasions is likely to expand the scope of a trial and distract from the elements of the specific charge, inadmissibility is premised on the danger that such evidence will be misused adversely to the accused and will

therefore have a “prejudicial effect”, leading to the weighing exercise required by s 101.”

*Director of Public Prosecutions (NSW) v RDT* [2018] NSWCCA 293

58. In *RDT*, the respondent pleaded not guilty in the District Court to three counts of sexual intercourse with a child under 10 years of age and one count involving an act of indecency with a child under 10 years of age. The complainant in respect of each count was the respondent’s daughter, aged between 3 and 5 years at the relevant times. The three counts concerning sexual intercourse were allegedly occasioned by digital penetration.
59. Prior to the commencement of the trial, the prosecutor served a tendency notice relying on extraneous material, from several years after the alleged offending, to establish that the accused had a “sexual interest in pre-pubescent children, including pre-school age children” and, *inter alia*, a tendency to act upon that interest. The conduct demonstrated an interest in gaining access to toddlers in nappies and pre-pubescent girls for sexual activity and included sending a photograph and message, as well as admissions to police. The trial judge rejected this evidence under s 97 of the Act and the Crown appealed that decision to the CCA under s 5F(3A) *Criminal Appeal Act 1912* (NSW).
60. Much of the leading judgment of Basten JA concerned the nature of the Court’s function in determining an appeal from a ruling on the admissibility of evidence and whether the correctness standard of review in *Warren v Coombes*<sup>3</sup> or the deferential standard of review in *House v The King*<sup>4</sup> applied. His Honour ultimately concluded that the Court should review the decision of the trial judge to reject the tendency evidence according to a correctness standard, citing *Bauer* at [61]. Justices R A Hulme and Johnson refrained, however, from reaching a conclusion on this point as counsel had not submitted on the issue. Their Honours also found that the error established by the Crown would satisfy both the correctness and deferential standards of review.

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<sup>3</sup> (1979) 142 CLR 531; [1979] HCA 9.

<sup>4</sup> (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

61. In upholding the Crown’s s 5F appeal, Basten JA, with whom Johnson and R A Hulme JJ agreed, engaged in an analysis of *Bauer, Hughes and McPhillamy* before reaching the following conclusions:

“[T]here is a qualitative difference between a man having a sexual interest in teenage boys, examples of which are replete throughout recorded history, and a mature male having an interest in female toddlers in nappies” (at [34]).

...

“The reasoning in particular cases will depend upon the nature of the alleged offending and the nature of the tendency evidence. Where the underlying propensity is accepted by the accused as operating over an extended period, its probative value is likely to be significant, even if the occasions upon which he acted upon the propensity were few and far between” (at [36]).

...

“[T]he issue is whether the accused in fact committed acts on his own daughter between the ages of three and five years involving digital penetration of her genitals for his own sexual gratification. Ordinary human experience suggests that such conduct is most unusual and far more unusual than conduct involving a homosexual interest in teenage boys or a heterosexual interest in girls over 10 years. Evidence which demonstrated that the respondent had such a proclivity, namely deriving sexual gratification from activity with very young children, would provide powerful support for the evidence of the complainant ...

While it is also true that there was a gap of some eight years between the alleged conduct with the complainant and the conduct which occurred in 2015, the accused’s own admission to having had such a sexual interest over that period renders the temporal gap largely immaterial” (at [40]-[41]).

*BC v R* [2019] NSWCCA 111

62. In *BC*, the applicant was retried before a judge and jury and convicted of 20 counts of child sexual assault offences against four different complainants. The offences occurred

over a 17 year period from 1994 to 2011 when the complainants were aged between 3 and 13 years and the applicant was aged between 12 and 29 years. Two complainants were boys and two were girls. The conduct in respect of both boys involved mutual fellatio and fondling; and the conduct in respect of the girls involved the applicant touching their vaginas and, in one count, superficial penile-vaginal penetration.

63. The Crown presented one indictment and served a tendency notice seeking to have the evidence in respect of each count cross-admissible as tendency evidence in respect of each other count. The applicant unsuccessfully applied to exclude the tendency evidence and separate the trials; and then unsuccessfully appealed that decision to the CCA under s 5F(3) *Criminal Appeal Act 1912* (NSW): *BC v The Queen* [2015] NSWCCA 327. Special leave to the HCA was dismissed.<sup>5</sup>
64. Leaving to one side the complicated procedural history of the matter, the relevant issues on the conviction appeal were: 1) the application of *doli incapax* in respect of counts 1 to 3, when the applicant was aged 11 and 13 years; and 2) the cross-admissibility of the tendency evidence in respect of the four complainants.
65. The joint judgment of the Court, constituted by Leeming JA, Ierace J and Hidden AJ, found that the Crown had failed to rebut the presumption of *doli incapax* in respect of counts 1 to 3 and, accordingly, those convictions were quashed, and acquittals were entered. In relation to the decision to admit the tendency evidence<sup>6</sup> and not order separate trials, however, the Court found against the applicant and dismissed the appeal against conviction in respect of counts 4 to 20.
66. In reaching its conclusion, the Court, at [59], had regard to the following passage of the HCA in *Bauer* at [61]:

“The question of whether tendency evidence is of significant probative value is one to which there can only ever be one correct answer, albeit one about which reasonable minds may sometimes differ. Consequently, in an appeal against conviction to an intermediate court of appeal, or on a subsequent appeal to this Court, it is for the

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<sup>5</sup> *BC v The Queen* [2016] HCASL 166.

<sup>6</sup> In both the first trial and the retrial.

court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was.”

67. The Court also accepted the applicant’s submission that little or no deference needed to be afforded to the CCA’s 2015 s 5F(3) ruling in favour of the trial judge’s decision to admit the tendency evidence and refuse to separate the trials.<sup>7</sup> This was due, in part, to the intervening decisions of *Hughes*, *Bauer* and *McPhillamy* that had substantially developed the law of tendency in the interim. Therefore, the Court proceeded to decide for itself whether the tendency evidence had significant probative value and whether the probative value substantially outweighed any prejudicial effect on the applicant.

68. At [71], the Court referred to *Bauer* while drawing a distinction between single and multiple complainant matters:

“In accordance with *Bauer*, a distinction is to be drawn between cases involving evidence of single complainants versus those involving evidence of multiple complainants. As the Court stated at [48], tendency evidence by a single complainant concerning acts relating to him or her “may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature.”

69. The Court then emphasised that where there are multiple complainants, there needs to be some common feature, as described in *Bauer* at [58] and reinforced in *McPhillamy* at [31]. In this appeal, the applicant pointed to various features which involved what were asserted to be significant differences in the conduct in respect of the four complainants.

70. The Court found at [75], however, that “[s]uch individual comparative exercises carry little weight...”; and, citing *Hughes* at [62], “it is not correct to compare in isolation, as to the applicant sought to do, counts which have been identified by their apparent disparities (at [76]). The totality of the evidence must be taken into account, as required

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<sup>7</sup> *BC v The Queen* [2015] NSWCCA 327.

by s 97(1)(b) of the Act, which relevantly provides, “having regard to other evidence adduced or to be adduced”.

71. In accepting that the evidence had significant probative value, in contrast to *McPhillamy*, the Court stated:

“No such time gap existed in the present case, whether the applicant is accused of having committed numerous and regular assaults over the course of some 16 years following substantially the same pattern” (at [79]).

“[E]ach incident shared the common feature of the applicant’s obtaining the consent or physical cooperation of the child prior to engaging in sexual touching” (at [80]).

“The extreme youth of the victims when the assaults began, the mode in which contact was originally made, the absence of physical threat described a tendency which was sufficiently specific and unusual to be significantly probative of whether each complainant was to be believed” (at [82]).

72. The Court then turned to s 101(2) and referred to *Hughes* at [17] which sets out the types of prejudice that can arise when tendency evidence is adduced in a criminal trial. The Court then set out the trial judge’s directions at length and found, conformably with *DAO v the Queen* [2011] NSWCCA 63 at [172], that those directions appropriately ameliorated the prejudicial effect of the tendency evidence.
73. The final tendency point that the Court was required to decide involved whether, having regard to the quashing of the convictions and entering of acquittals to counts 1 to 3, due to *doli incapax*, the fact that the relevant conduct was before the jury as tendency evidence meant that a retrial ought be ordered in respect of counts 4 to 20.
74. In deciding against the applicant on this point, the Court distinguished *DS v R* [2018] NSWCCA 195 because that case, like *McPhillamy*, involved a substantial time difference between the relevant incidents. No such time difference existed in the present case. The Court was also mindful that in the present case, all of the conduct was before the jury on the one indictment and they had the benefit of standard directions to consider each count separately.

75. In *Jackson*, the applicant was tried before a judge and jury in respect of six counts of indecent assault and sexual assault offences against two different child complainants. Counts 1 to 4 concerned complainant AM. Counts 5 and 6 concerned complainant NC. The jury ultimately found the applicant guilty of counts 1 and 2 but acquitted him of counts 3 to 6. Count 1 involved the applicant rubbing his erect penis on the backside of AM and count 2 involved the applicant fondling and sucking AM's penis.
76. At trial, the Crown was permitted, over objection, to lead tendency evidence of, *inter alia*, uncharged acts in respect of NC's brother, WC, to show that the applicant had a sexual interest in young males and that he was willing to act on that interest (at [14]). The trial judge gave the jury clear directions, however, that they must be satisfied to the criminal standard of beyond reasonable doubt that the disputed tendency acts in fact occurred (at [38]).
77. Somewhat unusually, in the CCA, the applicant, citing *Bauer* at [86], argued that:
- “[T]his direction by the trial judge effected a serious unfair prejudice to the applicant because in all of the circumstances “there was an unacceptable, appreciable and demonstrable risk that, if found beyond reasonable doubt, the evidence would be accorded significant or substantial undue weight” (at [44]).
- “[T]he applicant did not benefit from the criminal standard direction being given, and that it was not desirable in the circumstances” (at [50]).
78. The applicant also argued that:
- “WC's evidence was elevated to an essential intermediate fact by the trial judge's directions as to the standard of proof... [and] there was a real and demonstrable possibility that WC's evidence was regarded in this way ... [and] if so regarded, the tendency evidence of WC was invested with a probative value by the jury that did not “substantially” outweigh “any prejudicial effect it may have on the defendant” (at [99]).”

79. In rejecting these arguments and dismissing the conviction appeal, Price J, with whom Hoeben CJ at CL and Walton J agreed, declined to determine the issue of the appropriate standard of proof for tendency evidence following *Bauer*. His Honour did observe, however, at [68]:

“It is ordinarily the case that an accused person favours the application of the criminal standard of proof and not the Crown. In the present case, the usual argumentation has been inverted.”

80. His Honour set out the trial judge’s directions in detail and concluded that the jury had clearly paid careful attention to them as they had acquitted the applicant of four of the six counts on the indictment. His Honour was not persuaded that the jury had misused the evidence of WC as contended by the applicant.

81. His Honour concluded with the following determination in respect of the tendency evidence:

“WC’s evidence had significant probative value as it was capable of establishing the tendency asserted by the Crown and that he acted upon that tendency. Furthermore, the existence of that tendency made it more likely, to a significant extent, that the applicant acted upon that tendency by committing the sexual offences with which he had been charged (at [110]).”

*ABR (a pseudonym) v R* [2020] NSWCCA 33

82. In *ABR*, the applicant was tried before a judge and jury and convicted of five offences of indecent assault of the complainant, contrary to s 61M(2) *Crimes Act 1900* (NSW) and one offence of inciting the complainant, then under the age of 10 years, to commit an act of indecency with him, contrary to s 61O(2) *Crimes Act*. The complainant was the applicant’s step-daughter, aged between 6 and 7 years at the relevant time. The conduct involved, variously, touching of her vagina with his fingers and nose, grabbing her hand and placing it on his penis, and jumping into bed with her while his penis was erect and inviting her to engage in sexual activity.

83. At trial, the Crown was permitted, over objection, to lead tendency evidence in the form of: Google searches by the applicant that included search terms such as “preteen first orgasm” and “full vaginal penetration of prepubescent girl”; six saved “images of pre-pubescent vaginas”; and ten “pornography websites” extracted from the browsing history of the applicant’s laptop.
84. In the CCA, Meagher JA, with whom Bellew and Lonergan JJ agreed, dismissed the appeal against conviction after dealing with all 23 grounds posed by the then self-represented applicant. Only grounds 3-5 at [31]-[39] concerned the ruling as to the admissibility of the tendency evidence.
85. The Crown tendency notice asserted that the applicant had a tendency to have a particular state of mind, namely a sexual interest in pre-pubescent or preteen girls. The evidence in support of the notice was comprised of the aforementioned Google searches, images and websites. The applicant submitted that the evidence did not show a “preparedness to physically act on that state of mind” and that, per *McPhillamy* at [26]-[27], it is generally the “tendency to *act* on the sexual interest that gives tendency evidence in sexual cases its probative value” (at [32]).
86. Moreover, the applicant argued that, even if the tendency evidence did have significant probative value, s 101(2) would operate to exclude the evidence because its probative value would not substantially outweigh its prejudicial effect, having regard to the evidence containing “horrific and abhorrent material that an ordinary member of society would find so emotionally affecting” and impair their “ability to remain objective and logical and [to] consider [the] evidence impartially” (at [33]).
87. His Honour rejected these arguments at paras [35]-[39] and the salient aspects of the analysis are set out as follows:

“As the decisions in *Hughes* at [57] and *RDT* at [34] show [citations omitted], whether proof of a tendency to have a particular state of mind, being a specific sexual interest, increases the likelihood of the commission of the offence depends on the nature of that interest and of the alleged offending, **and the issues which arise in the accused’s defence** (emphasis added) of the charged conduct” (at [35]).

“Counts 1, 2, 3 and 6 involve allegations that the applicant touched or rubbed the complainant’s vagina on the outside of her underpants or pushed his nose into her vagina, to which one aspect of **the applicant’s defence was that any such conduct was innocent and incidental** (emphasis added) to his picking the complainant up in the course of play. The tendency evidence proved a sexual interest in pre-pubescent girls, and in particular in the vaginas of pre-pubescent girls. That state of mind was shown by the 2015 searches undertaken with the Apple Mac laptop to continue to the time of the alleged offending. The ... evidence was capable of supporting a finding that touching and rubbing had occurred, the question being whether it was unintended and innocent or deliberate and conscious. **In these circumstances the fact of the applicant’s sexual interest made it more likely that what the complainant reported to experience on a number of occasions was deliberate and committed in furtherance of the applicant’s interest** (emphasis added). For these reasons in my view the tendency evidence had significant probative value and the trial judge did not err in so concluding” (at [36]).

88. And finally, in terms of balancing the probative value with the prejudicial effect under s 101(2), his Honour found that the directions appropriately ameliorated the risk of the evidence being misused by the jury by reason of some irrational, emotional or illogical response.

*Hamilton (a pseudonym) v R* [2020] NSWCCA 80

89. In *Hamilton*, the applicant was tried before a judge and jury and convicted of 10 counts of aggravated indecent assault against three of his five children, contrary to s 61M(2) *Crimes Act 1900* (NSW). The offending against the first complainant was constituted by the applicant rubbing his daughter’s vagina in bed on three separate occasions. The offending in respect of the other two complainants was constituted by the applicant grabbing the penis and buttocks of two of his sons as they were getting out of the shower.
90. At trial, the Crown sought to run the trials jointly and have all the charged and uncharged conduct ruled cross-admissible for a tendency purpose. Unusually, the defence did not seek to separate the trials and did not object to the admission of the

various uncharged acts; rather, objection was simply taken to the evidence being used for a tendency purpose. It was common ground that there were various inconsistencies in the evidence given by the three complainants. The defence opted to rely on the various inconsistencies to adversely reflect on the credibility of each complainant and support the contention that the allegations were concocted at the behest of the applicant's wife who had initiated Family Court proceedings against him.

91. The trial judge ultimately found that the tendency evidence had significant probative value but that it did not substantially outweigh its prejudicial effect per s 101(2) of the Act. This was, in part, due to the Crown relying on a slew of uncharged acts that some of the children alleged occurred against one of the male complainants, in circumstances where that complainant made no mention of same. The trial judge was concerned about the jury being misled or confused about that discrepancy, particularly as the evidence was already admissible as context evidence and good character rebuttal evidence.
92. In rejecting the tendency evidence, however, the trial judge did not give the jury a so called "anti-tendency warning" in respect of the charged acts, only the uncharged acts. This was the basis of ground 1 of the appeal which asserted that the trial miscarried as a result of the jury not being warned as to the unavailability of tendency reasoning in relation to the evidence of the charged acts. The other grounds of appeal are not relevant for the purposes of this discussion.
93. In dismissing the conviction appeal, Beech-Jones J, with whom Adamson J agreed, made the following observations in respect of anti-tendency directions at [113]:

"[T]here is neither a requirement or even a presumption that in all cases in which multiple counts of sexual assault involving different victims are tried together then, unless the evidence in respect of the counts is admissible as tendency evidence on the other counts, an anti-tendency direction must be given such that a failure to do so will amount to a miscarriage of justice...

Ultimately, whether a miscarriage of justice has occurred will depend on whether there was a "real chance", "it was likely that", or there was a "significant risk" that "forbidden reasoning" would be or was employed (citations omitted) ...

Further, in making an assessment of the risk that the jury might engage in tendency reasoning in the absence of an anti-tendency direction, the failure of counsel for the applicant at the trial to seek such a direction can affect an assessment of the likelihood that the jury would reason impermissibly in the absence of an anti-tendency direction.”

*Vagg v R* [2020] NSWCCA 134

94. In *Vagg*, the applicant was tried before a judge and jury and convicted of two counts of sexual intercourse with a child under 10 years, contrary to s 66A *Crimes Act 1900* (NSW). Both offences were committed on the same day against one complainant who was 7 years of age at the relevant time. The offending occurred in the context of the applicant being engaged by the complainant’s parents to clean windows at their home in Sydney. Both counts were constituted by digital penetration of the complainant’s vagina.
95. At trial, the Crown was permitted, over objection, to lead tendency evidence in respect of two uncharged acts by the applicant towards a different girl who was 6 or 7 years of age at the relevant time. This girl was known to the applicant through family associations and both incidents occurred three or four years *after* the events the subject of the trial.
96. The first incident occurred at a family gathering on Christmas Eve and involved the applicant asking the girl to take him to an outside bathroom and then asking her to sit next to him while he was urinating.
97. The second incident occurred at a different family gathering and similarly involved the applicant asking the girl to accompany him to the bathroom but this time exposing his penis to her.
98. On appeal, the only issue was the admissibility of the tendency evidence and specifically: whether it supported the existence of a tendency in the applicant to have a sexual interest in girls under the age of 10; whether it supported a tendency to act on that interest; whether the evidence had significant probative value; and whether the probative value substantially outweighed its prejudicial effect.

99. The conduct in respect of each incident was markedly different. The tendency evidence involved a girl known to the applicant and an indecent exposure at its height. Whereas the trial conduct involved the repeated digital penetration of a girl unknown to the applicant.
100. Simpson AJA, with whom Rothman and N Adams JJ agreed, grappled with these issues before ultimately dismissing the appeal. Her Honour found, at [55]-[60], that the first tendency incident was not overtly sexual however, when considered in context with the second incident, the sexual motivation became apparent.
101. Her Honour observed, at [73], that the two tendency incidents were in some respects substantially different in nature from the conduct the subject of the trial. However, her Honour found that there were sufficient common features, at [67], to support the asserted tendencies. These included the fact that the applicant was a visitor to the home of both children, and that he enlisted the help of both children before opportunistically engaging in sexual activities with them.
102. On the question of significant probative value, her Honour found, at [76], that in circumstances where there was some doubt as to whether the person who committed the offences was the applicant, evidence that showed he was a person who had a sexual interest in young girls (however that interest was manifested) was likely to be influential in determining whether he was the perpetrator.
103. Finally, her Honour found, at [77], that while the tendency evidence was likely to be prejudicial, directions can go a long way to ameliorating any potential misuse of damaging evidence or other prejudicial effects.<sup>8</sup> In this case there were no complaints made as to the adequacy of the trial directions and the Court was satisfied that the probative value of the evidence substantially outweighed any prejudicial effect: s 102(2) of the Act.

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<sup>8</sup> *DAO v The Queen* [2011] NSWCCA 63 at [14], [104] and [171].

104. In *WG v R; KG v R*, the applicants were tried before a judge and jury and convicted, following a long and complex trial, of over 100 aggravated sexual assaults and indecent assaults of their daughter, from when she was between 5 and 19 years of age. The following analysis, taken from a judgment in the Court of Criminal Appeal of some 399 pages, relates only to the tendency evidence constituted by sexualised photographs of the complainant that were either commissioned or taken by her mother, KG, when the complainant was aged between 16 and 20.
105. At trial, the Crown was permitted, over objection, to lead evidence of the sexualised photographs of the complainant as demonstrative of KG's tendency to have a sexual interest in her daughter. The photographs were also admitted as context evidence to inform the nature of their relationship. At the heart of the controversy was the defence contention that the photographs were merely saucy and indistinguishable from photographs other parents would routinely take of their children at the beach (at [1170]-[1171]).
106. On appeal, Fullerton J, with whom Bathurst CJ<sup>9</sup> agreed, noted that counsel for KG had cited *Bauer* at [48] as authority for the proposition that "the admissibility of tendency evidence is limited to either acts which are themselves criminal, or acts otherwise probative of an accused having a sexual interest in a complainant which the accused then acted upon" (at [1174]). It was argued, on behalf of KG, that the photographs themselves did not constitute any criminal act and showed nothing more than a "relaxed family relationship around issues of nudity" (at [1175]).
107. Fullerton J found that the passage cited from *Bauer* did not impose the limitation suggested by Senior Counsel for KG. Her Honour relied on paragraph [49] of *Bauer* which is the following terms:

"As the trial judge in substance observed, it has long been the law that a complainant's evidence of charged and uncharged sexual acts may be of significant probative value

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<sup>9</sup> Fagan J also agreed, insofar as the tendency point at [1589]; HH was, however, in dissent in terms of the majority's dismissal of the conviction appeals.

in the proof of other charged sexual acts. Taken in combination with other evidence, it may establish the existence of a sexual attraction of the accused to the complainant and a willingness to act on it which assists to eliminate doubts that might otherwise attend the complainant's evidence of the charged acts..."

108. Her Honour concluded with the following remarks regarding the tendency photographs:

"While the photographs did not constitute a sexual act, it was open to the jury to regard KG's conduct in commissioning the photographs of a sexualised nature as capable of showing a tendency to have a sexual interest in her children (at [1177])."

"Ultimately, of course, whether the photographs were capable of exposing a tendency of that kind was a matter for the jury. To the extent that the jury accepted that the photographs were innocently explained by KG in her evidence, it follows they were deprived of the tendency for which the Crown contended... (at [1178])."

109. The ground of appeal concerning this tendency evidence, and ultimately the conviction appeals themselves, were all dismissed.

*BRC v R* [2020] NSWCCA 176

110. In *BRC*, the applicant was tried before a judge and jury in relation to, *inter alia*, 8 counts of sexual intercourse with a child under the age of 10 years. At the conclusion of the trial the applicant was convicted of 7 of those counts. The conduct the subject of the trial occurred between 1992 and 1999 and involved four male and female child complainants. There were also two other uncharged sexual acts alleged to have been committed by the applicant which were relied upon as context evidence by the Crown.

111. At trial, the Crown sought to run the trials jointly with the evidence of each complainant cross-admissible for a tendency purpose. The defence made an application to separate the trials in respect of each complainant and the outcome of that application hinged completely on the admissibility of the tendency evidence. Ultimately, the trial judge found that the tendency evidence had significant probative value, was not excluded by s 101(2), was therefore admissible; and, accordingly, the severance application was refused (at [13]).

112. The applicant took issue with the fact that the trial judge did not direct the jury to avoid reasoning that the applicant was a person of bad character, having regard to the admitted tendency evidence; and did not direct the jury against punishing the applicant for the uncharged acts that were admitted as context evidence. Simpson AJA ultimately refused leave to appeal on those bases, with Johnson and Hamill JJ agreeing with separate reasons.
113. In reaching that conclusion, Simpson AJA conducted a thorough analysis of the differences between context and tendency evidence and the origins of the Criminal Trial Courts Bench Book issued by the NSW Judicial Commission (see [28]-[62]).
114. In relation to the bad character complaint, her Honour stated the following at [72]:
- “It would have made little sense and would have been contradictory and confusing to follow that direction with a direction that the jury could not reason that, because the applicant had committed one or more of those acts, he was a person of bad character and must have committed one or more of the offences charged. The very point of tendency evidence is that, when it becomes admissible, it may establish a “propensity” – which may be a criminal propensity. While finding that an accused person has a tendency to commit criminal acts might not be co-extensive with a finding that that person is “generally a person of bad character”, it is **not very far removed** (emphasis added).”
115. Her Honour was also unpersuaded that any error existed in relation to the context evidence directions given at trial. The fact that no issue was taken by experienced trial counsel at the time was a significant matter in her Honour’s mind on this point (see [75]).
116. In *obiter*, Johnson J gave some consideration to the *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW) that commenced on 1 July 2020 following the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse in 2017 (see [87]-[92]). His Honour concluded by noting at [92]:

“It is clear that statutory reforms in this area will be the subject of appellate consideration by this Court, and that what is said in that respect will assist the authors of the Bench Book to frame suggested directions in the future.”

117. Hamill J added the following to his agreement with Simpson AJA on the issue of the intersection of tendency and bad character at [96]:

“It may be that the use of the phrase “generally a person of bad character” is designed to distinguish the forbidden reasoning process from the process of using specific tendencies established by the evidence in considering the counts on the indictment. However, that distinction is likely to be elusive to a jury. It is difficult to imagine a jury finding that an accused person has a tendency to act on his sexual attraction to children and **not consider** (emphasis added) them to be “generally a person of bad character””.

*Casey v R* [2020] NSWCCA 177

118. In *Casey*, the applicant was tried before a judge and jury and convicted of sexual offences in respect of two child complainants, who were brothers, in the 1980s. The case had a complex procedural history and the ultimately unsuccessful appeal was mounted on multiple bases, including that the admission at trial of tendency evidence gave rise to a miscarriage of justice.

119. Adamson J, with whom Hoeben CJ at CL and Bellew J agreed, dealt with the tendency ground from [77]-[85]. In challenging the admission of the tendency evidence, Senior Counsel for the applicant argued that *Casey* was on “all fours with *McPhillamy*” (at [80]); that all the evidence could establish was a “bare tendency to act on a sexual interest in young pubescent boys and that this, while relevant, was insufficient...”; and the alleged offending against the tendency witness was “significantly different” from the alleged offending against the brother complainants.

120. In rejecting the applicant’s argument, Adamson J made the following findings at [85]:

“In each case, the applicant used his position as a Catholic priest to befriend the pubescent boy and to engineer a situation where the boy, with another or others,

stayed overnight in premises over which the applicant had control in that he was the only adult present... I am satisfied that these matters go beyond merely a tendency to have a sexual preference for pubescent boys (as in *McPhillamy*) and establish a tendency to act on his sexual preference by sexually assaulting pubescent boys in a materially similar way. These additional common features are sufficient to give the evidence substantial probative value and make it admissible under ss 97 and 101 of the *Evidence Act: The Queen v Bauer* [2018] HCA 40.”

### Murder

121. As stated above, many of the legislative amendments pertain only to child sexual assault matters and do not apply to all criminal cases. While the amendment to s 101 changes the approach to the second stage of the consideration in all matters, the principles in *Bauer, Hughes* and *McPhillamy* remain applicable. Indeed, defence practitioners should give consideration to whether the matters prohibited under s 97A(5) are relevant to any argument concerning significant probative value where the case does not concern child sexual assault.

### *R v Warwick (No 93)* [2020] NSWSC 926

122. Tendency evidence and reasoning played an important part in the murder trial of Leonard John Warwick that concluded on 23 July 2020 after 207 days of trial, over two years, before Garling J. Mr Warwick was ultimately found guilty of multiple murders and bombings in the wake of extreme violence targeted at the Family Court of Australia, its judges and a practitioner in the 1980s.

123. After making a finding beyond reasonable doubt that the accused was responsible for detonating a bomb in the Kingdom Hall at Casula in 1985, killing one person and maiming many others, the Court accepted the Crown’s contention that the accused had the following two tendencies (at [1128]):

- (a) to hold animosity towards individuals or institutions who act in such a way as to adversely affect his access to his daughter, where such animosity, in the case of individuals, includes an intention to kill; and

(b) to commit violence against individuals or institutions who act in such a way as to adversely affect his access to his daughter.

124. The Court was willing to accept the existence of these tendencies because of its conclusion that the accused's motive, in attacking the Kingdom Hall, was to harm members of the Lurnea congregation who he believed had interfered with, and prevented access to his daughter, by assisting her mother to escape to an undisclosed location (at [1134]).
125. The Court was then invited to engage in tendency reasoning in assessing the Crown case in respect of the other counts. Beginning with the murder of Justice Opas in 1980, however, Garling J expressed discomfort in retrospectively applying tendency reasoning five years earlier because "[f]ive years is a sufficient number of years for human character traits to potentially evolve or alter. It cannot be readily assumed human nature is always constant over a five year period" (at [1293]). His Honour did make it clear, however, that tendency reasoning is amenable to retrospective application, even for a period of five years or more in an appropriate case, but that this was not such a case.
126. Notwithstanding the rejection of tendency reasoning in respect of the 1980 murder of Justice Opas, the Court proceeded to make a finding beyond reasonable doubt that the accused was responsible for this offence. His Honour then remarked that, in the circumstances of this case, tendency reasoning could be more readily applied prospectively once established, rather than retrospectively (at [1421]).
127. Now that the accused's violent tendencies, in respect of anyone or anything that interfered with his access to his daughter, were proven to have existed as early as 1980, the Court proceeded to take them into account in respect of the balance of the offences, as a circumstance that "can, and should, be taken into account as a factor pointing to the guilt of the Accused" (see [1179]).
128. As a result of the tendency evidence, in conjunction with coincidence, DNA and other circumstantial evidence, the accused was found guilty of all the principal offences on

the indictment except for the alleged murder of his then brother-in-law, Stephen Blanchard in 1980, the only offence for which he was acquitted.

*TL v R* [2020] NSWCCA 265

129. In *TL*, the applicant was tried before a judge and jury in the Supreme Court of NSW at Coffs Harbour and convicted of one count of murder, contrary to s 18(1)(a) *Crimes Act 1900* (NSW). The victim was the two and a half year old stepdaughter of the applicant.
130. The issue at trial was whether the Crown had proved beyond reasonable doubt that *TL* had inflicted blunt force trauma to the abdomen of the victim with intent to cause grievous bodily harm, as opposed to two other family members who *could* have been responsible. The identity of the perpetrator was squarely in issue.
131. At trial, the Crown was permitted, over objection, to lead evidence that the victim had sustained scalds and burns to her feet and buttocks in the bath while in the applicant's care, 10 days before her death, as tendency evidence (at [152]).
132. The asserted tendency was that the applicant had a tendency to deliberately inflict physical harm on the victim (at [164]) and the evidence was led on the basis that if the jury were satisfied *beyond reasonable doubt* that the applicant had deliberately inflicted injuries on the victim in the weeks leading up to her death, then it rendered it more likely that he was responsible for the fatal injuries that she suffered soon thereafter (at [154]). It is noted that the effect of the new s 161A *Criminal Procedure Act* discussed above would not require the proof of tendency beyond reasonable doubt, although, having regard to the outcome of the appeal here, it would not have changed the result.
133. The appeal proceeded on multiple grounds, including ground 3, namely that the trial judge erred in admitting the tendency evidence of the victim's prior burn injuries. Hoeben CJ at CL, with whom Adamson J, with additional reasons, and Bellew J agreed, dealt with the tendency ground from [151]-[228].
134. The applicant relied heavily on *Hughes v The Queen* [2017] HCA 20 at [39] where it was made clear that where identity is in issue, as in this case "the probative value of the

tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence”.

135. The applicant argued that the harm giving rise to the tendency evidence, namely burns, had no similarity to the blunt force trauma that ultimately caused the child’s death and therefore was bereft of significant probative value (at [183]-[188]).

136. The applicant further contended that the evidence of scalds/burns to a very young child was highly emotional, apt to be misused and therefore even if it was found to have significant probative value, it ought to have been excluded under the balancing test prescribed by s 101(2) (at [189]-[190]).

137. In dismissing this ground, and ultimately the entire appeal, Hoeben CJ at CL found, *inter alia*:

“The admissibility of tendency evidence depends on the significant probative value of the tendency, **taken together with other evidence in the case**” (emphasis added) (at [206]).

...

“It follows therefore that the requirement for close similarity should arise when the tendency evidence is the only or predominant evidence that goes to identity... The undisputed fact that only three persons had the opportunity to kill [the victim] was decisive evidence” (at [207]).

...

“[A] single previous incident can form the basis of tendency evidence (*Aravena v R* (2015) 91 NSWLR 258; [2015] NSWCCA 288 at [86]). In this case, the fact that the bath incident involved the same victim on an occasion very close in time to the receiving of the blunt force trauma, meant that even one previous episode of abuse by the applicant would have significant probative value in determining from the three possible suspects, who it was that murdered [the victim]” (at [224]).

“Harm to a child will always engender strong feelings. That alone is not a bar in the many trials of sexual abuse where tendency evidence is admitted. The directions of a trial judge, as were given by her Honour in this case, can remove that risk of prejudice” (at [226]).

### Armed Robbery

*Ilievski v R; Nolan v R* [2018] NSWCCA 164

138. The applicants were convicted of an armed robbery together with another man, Kwu. The identity of the offenders was in issue.

139. The Crown relied upon tendency evidence that all three had previously committed an armed robbery nine years earlier. It also relied upon tendency evidence Kwu had conspired to commit a robbery three months afterwards with other offenders. A Mercedes was used in the commission of the robbery. Bathurst CJ (with whom Fullerton and Campbell JJ agreed) set out the Crown case absent the tendency evidence at [16]:

“First, the Crown contended that the evidence established that Mr Ilievski and Mr Nolan had the opportunity to take the stolen number plates displayed on the Mercedes during the robbery. Second, it contended that the evidence established that Mr Ilievski, Mr Nolan and Mr Kwu had the opportunity to commit the robbery at the relevant time. Third, it contended that the evidence established that Mr Ilievski had possession and control of the Mercedes used in the robbery at various points in time after the robbery.”

140. Accordingly, it could not be said that the evidence linking each of the accused to the robbery, or even placing them at the scene of the crime was conclusive. Bathurst CJ concluded that the tendency evidence lacked significant probative value. Assuming a tendency was revealed upon the evidence, the Chief Justice found that the evidence lacked significant probative value (at [106]):

“What was principally relied upon by the Crown was the fact that the applicants and Mr Kwu committed the earlier robbery together, however, I do not think that this results in the evidence having significant probative value as the majority pointed out

in *Hughes* at [39], the probative value of tendency evidence which is used to prove the identity of an offender for a known offence will “almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. The fact that the three accused on one prior occasion committed an armed robbery together in somewhat similar circumstances to the robbery for which the applicants were charged does not give rise to a tendency having significant probative value where the similar features could be said to be common to many bank robberies.”

141. Notably, the Crown did not contend that the evidence could be characterised as coincidence evidence under s 98. Bathurst CJ stated (at [104]):

“It is important to bear in mind that the evidence is not relied upon as coincidence evidence. The fact that the three accused committed an armed robbery in circumstances which might be said to be common to armed robberies, such as using dangerous weapons, threatening staff, wearing disguises, using a high-performance luxury motor vehicle and dumping it after the robbery, whether in a carpark as in the robbery in 2003 or as alleged in the present case, in a public street, does not establish a tendency to commit armed robberies to the standard required by s 97(1)(b).”

142. The appeals in that case were allowed on certain counts and new trials were ordered. The Chief Justice concluded at [123]:

“In the present case, although there was undoubtedly a strong circumstantial case against the applicants, the wrongful admission of the tendency evidence, in my view, leads to the conclusion that there was a substantial miscarriage of justice so as to render the proviso inapplicable.”

143. Comparing the approach to tendency in *Ilievski* to a child sexual assault case where s 97A is applicable, s 97A would almost certainly permit acceptance of evidence as tendency where, hypothetically, an offence included child sexual assault but there were similar circumstantial “markers” of conduct. It may be that s 97A permits evidence which might otherwise be considered to be coincidence evidence to be characterised as evidence of tendency.

## Conclusion

144. In 2021 and beyond, the law in respect of tendency is likely to rapidly evolve. We consider that it is likely that there will be substantial argument about what constitutes “sufficient grounds” under s 97A(4) and “exceptional circumstances” under s 97A(5) of the Act.
145. It is clear that the various amendments considered in this paper usher in a far more expansive approach to tendency evidence in child sexual assault cases and are likely to alter the procedural landscape with the presumption of joint trials where there are multiple complainants. The amendments are considered to arise from an evidence-based approach to child sexual assault complaints and patterns in offending behaviour following the Royal Commission. The question for parliament will be whether the amendments strike the correct balance between the experience of sexual assault victims and observed patterns in offending conduct and the need to ensure a fair trial for an accused.

Dubbo, NSW

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**Nicholas Broadbent**

Public Defender

[Nicholas.Broadbent@justice.nsw.gov.au](mailto:Nicholas.Broadbent@justice.nsw.gov.au)

**Derek Buchanan**

Solicitor Advocate - Legal Aid NSW

[derek.buchanan@legalaid.nsw.gov.au](mailto:derek.buchanan@legalaid.nsw.gov.au)

