THE SCHLESWIG-HOLSTEIN QUESTION OF THE CRIMINAL LAW FINALLY RESOLVED? AN EXAMINATION OF SOUTH AUSTRALIA'S NEW APPROACH TO THE USE OF BAD CHARACTER EVIDENCE IN CRIMINAL PROCEEDINGS

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The *Evidence (Discreditable Conduct) Amendment Act* 2011 (SA) came into operation on 1 June 2012. The Act makes important changes to the admission and use of evidence of bad character in criminal proceedings. The new Act is intended to clarify and refine what has long proved to be a complex and confusing area of the criminal law. This article first explains the context of the new Act by outlining the history of the use of

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bad character evidence (including the particular types of bad character evidence; propensity evidence, similar fact evidence and context or background evidence) in the Australian common law. The article does this because the new Act is influenced by the common law. The article then compares and contrasts the common law with the new Act and its initial judicial interpretation, while conducting a critical analysis of the new Act. This article notes that the operation of the new Act rests on two assumptions, first, that evidence of bad character can be adduced in wider circumstances than the current Australian common law provides without unfairly prejudicing the accused and, secondly, that juries can understand and apply judicial directions as to the appropriate use of bad character evidence, including the use of judicial directions for limited purposes. Both of these assumptions have been often doubted. This article examines the two assumptions, referring to research about jury decision making, and concludes that they are both sound. This supports the approach taken by the Act, in which bad character evidence can be properly used in somewhat wider circumstances than the common law would allow. Finally, this article considers the intended operation of the new Act and asks whether it is likely to prove successful in bringing some semblance of clarity and order to this notoriously difficult area and justify the confidence expressed in it by the South Australian Attorney-General and resolve what he aptly described as the Schleswig-Holstein question of the criminal law.

I INTRODUCTION

> [T]he present law with respect to the admission and use of past misconduct in criminal proceedings is, frankly, in a mess. The present law in this area is not just complex but it is incomprehensible to many involved in the criminal justice system; be they police officers, jurors, lawyers and even magistrates and judges. It can be regarded as the legal equivalent of the famed Schleswig-Holstein question that bedevilled nineteenth century European diplomacy, of which Lord Palmerston, the British Prime Minister said: 'The Schleswig-Holstein question is so complicated, only three men in Europe have understood it. One was Prince Albert, who is dead. The second was a German professor who became mad thinking about it. I am the third and I have forgotten all about it.'[1]

[1] John Rau, the South Australian Attorney-General, South Australia, *Parliamentary Debates*, House of Assembly, 6 April 2011, 3288.

These were the forthright comments offered by the Hon. John Rau MP, the South Australian Attorney-General, in Parliament in 2011 to describe the current law as to the admission and use of evidence of past misconduct (i.e. evidence of the accused's bad character) in criminal proceedings. Mr Rau's comments are apposite. 'Few topics in law,' as Arenson comments, 'have engendered as much controversy and confusion' as the introduction and use of bad character evidence in criminal proceedings.[2] The complexity surrounding the use of bad character evidence has attracted much academic and legal commentary and debate and 'an immense amount of judicial, legal and academic ink has been spilt in trying to satisfactorily explain and rationalise this area of the law and attempting to reconcile the countless, and often inconsistent, decisions of the courts.'[3] This article considers the *Evidence (Discreditable Conduct) Amendment Act* 2011 (SA) ('the new Act') that came into effect in South Australia on 1 June 2012.

This article will first outline the history of the use of bad character evidence as the new Act, which, while making significant changes and intending to overrule or clarify a number of much criticised and/or confusing decisions of the High Court,[4] still draws heavily upon the common law position.[5] This article will then explain the context and framework of how the new Act governs the admission of this evidence and how it is likely to operate in practice.

The successful operation of the new Act is dependent upon two vital assumptions. First, the new Act assumes that evidence of bad character may be adduced in wider circumstances than the current Australian common law provides without causing unfair prejudice to the accused. This can be contrasted with the Australian common law

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2 Kenneth Arenson, 'The Propensity Evidence Conundrum: a Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Law Review* 31.

3 Rau, above n 1, 3288.

4 See *R v Hoch* (1988) 182 CLR 292; *R v Pfennig* (1995) 182 CLR 461; *R v Phillips* (2006) 225 CLR 303; *R v HML* (2008) 235 CLR 334. See now also *R v BBH* (2012) 286 ALR 89.

5 Rau, above n 1, 3289, 3290.

approach[6] which renders admissible a narrower scope of bad character evidence under the apprehension that such evidence, while generally acknowledged as 'relevant,' is inherently dangerous and is likely to prejudice the jury against the accused and likely to promote unfair convictions.[7] The new Act, while not intended to open the 'floodgates' to the routine and unrestricted admission of this evidence,[8] accepts the premise that bad character evidence can be properly adduced in wider circumstances than the present common law in Australia as declared by the High Court allows, without unfairly prejudicing the jury against the accused. Secondly, the new Act assumes that juries can understand and follow a judge's directions on the permissible and impermissible uses of bad character evidence.[9] Parliament's 'article of faith'[10] that juries can understand and follow the often complex directions they receive from a trial judge runs counter to the popular view that 'in most cases this is probably a polite fiction.'[11]

This article examines jury studies and concludes that the two assumptions underlying the new Act are in fact empirically sound. First, there is powerful empirical support for the view that evidence of bad character can be accurately used in the broader circumstances contemplated by the new Act than the present common law in Australia permits. Indeed, there is a strong argument that the new

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6 As expressed by the High Court in the decisions cited above at n 4, especially *R v Pfennig* (1995) 182 CLR 461 and *R v HML* (2008) 235 CLR 334. The High Court split in *HML* as to the admissibility and use of bad character evidence for non-similar fact or propensity purposes. No clear view emerged. See further, below n 58 and the discussions below in sections II(B) and IV.

7 See, eg, Arenson, above n 2, 34-35.

8 Rau, above n 1, 3289, 3290.

9 Ibid 3292-3293.

10 New Zealand Law Reform Commission, Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character (Report 103) (NZLRC, 2008) 110, [6.44].

11 Robert Howe QC, quoted by Queensland Law Reform Commission, A Review *of Jury Directions)* (QLRC, 2009) 33, [3.25]. See also, *R v Hill* [1999] SASC 359, [23]; Rupert Cross, 'The Evidence Report: Sense or Nonsense – a Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee' [1973] *Criminal Law Review* 329, 333.

Act is relatively modest in scope and it could have gone further to allow the use of evidence of bad character[12] while still not causing unfair prejudice to the accused or undermining the right to a fair trial.[13] Secondly, it is argued that juries can, despite the doubts that are often expressed in this regard,[14] be trusted with appropriate support to follow judicial directions to use bad character evidence correctly.

However, whether the new Act will resolve what the Attorney-General described as 'the legal equivalent of the famed 'Schleswig-Holstein question'[15] is another issue. The Attorney noted in Parliament that he had chosen to reject the *Uniform Evidence Act* (UEA) approach,[16] alluding to the problems that the operation of the

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[12] The Act may not go as far as the Government's initial stated intentions for reform in the run up to the 2010 State election might have suggested. See Nigel Hunt, 'Past to haunt Criminals under Rann Plan', *Sunday Mail*, 6 March 2010; David Nason, 'With election secured, AG Backtracks from hard line,' *The Australian*, 30 October 2010; Vicki Chapman, South Australia, *Parliamentary Debates*, House of Assembly, 26 July 2011, 4635-4636; Stephen Wade, South Australia, *Parliamentary Debates*, Legislative Council, 13 September 2011, 3743-3744; Ann Bressington, South Australia, *Parliamentary Debates*, Legislative Council, 13 September 2011, 3744; Mark Parnell, South Australia, *Parliamentary Debates*, Legislative Council, 14 September 2011, 3819-3820.

[13] See, eg, Mirko Bagaric and Kumar Amarasekara, 'The Prejudice Against Similar Fact Evidence' (2001) 5 *International Journal of Evidence and Proof* 71, who argue 'the supposed dangers of similar fact evidence or other problems associated with admitting such evidence in criminal proceedings are either non-existent or have been significantly exaggerated:' at 98. See further the discussion below in section VI(B).

[14] See, eg, New Zealand Law Commission, above n 10, 112; Queensland Law Reform Commission, above n 11, 400, [12.2], 403-404, [12.11], 430-432, [13.31]-[13.38], 441, [13.66]; Victorian Law Reform Commission, *Jury Directions: Final Report* (VLRC, 2009) 62, [3.159]-[3.161]; Elizabeth Najdovski-Terziovski, Jonathan Clough and James Ogloff, 'In Your Own Words: A Survey of Judicial Attitudes to Jury Communication' (2008) 18 *Journal of Judicial Administration* 65, 80.

[15] John Rau, the South Australian Attorney-General, South Australia, *Parliamentary Debates*, House of Assembly, 26 July 2011, 4637.

[16] The Australian Capital Territory, the Commonwealth, New South Wales, Tasmania, Victoria, Western Australia and the Northern Territory follow the UEA approach. The South Australian Attorney has made it clear that there are no plans for South Australia to join the UEA. Western Australia also has its

UEA has encountered in this area,[17] and had rather formulated another solution, enthusing that the new Act 'reads as an elegantly simple solution to this very complex problem ... we have reason to be positive about the way it will work in practice.'[18] Whether the new Act will justify the Attorney-General's expression of confidence remains to be seen.

The new Act ambitiously intends to bring some semblance of clarity to what has 'long been regarded as one of the most difficult, confusing and esoteric areas of the law'[19] by amending the *Evidence Act 1929* (SA) to make important changes to the common law. These changes permit the use in criminal proceedings of evidence of bad character[20] where relatively strict standards of probative value are met and where the trial judge has identified and explained to the jury

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own approach to the use of bad character evidence; see s 31A of the *Evidence Act 1906* (WA).

17 See, eg, Australian Law Reform Commission, *Family Violence – Improving Legal Frameworks (Consultation Paper 1)*, (ALRC, 2010) 208-211; Law Reform Institute of Tasmania, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants (Final Report 16)* (Law Reform Institute of Tasmania, 2012) 45-64; Annie Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (National Child Sexual Assault Reform Committee, 2010). Jeremy Rapke QC, the former Victorian DPP, asserted that the introduction of the UEA in Victoria in 2010 had led to a severance of more sex offence cases that would otherwise have run as a single trial, resulting in the 'discontinuance of prosecutions that had hitherto been viable.' See 'Justice, not Stats,' *The Sunday Age*, 1 May 2011.

18 Rau, above n 15, 4638.

19 Arenson, above n 2, 63.

20 Bad character evidence can also be used if a defendant has introduced evidence of his or her own good character to bolster their own credibility, attempted to cast unnecessary imputations or doubt upon the character of the prosecutor or a witness for the prosecution or given evidence against a co-defendant; see, eg, *Evidence Act 1929* (SA) s 18. But in this context the bad character evidence is solely adduced to shed light upon the defendant's credibility as a witness and it cannot be directly used to reason that the accused is more likely to be guilty of the offence. This particular use of bad character evidence is left untouched by the new Act.

the purposes for which the evidence may and may not be used.[21] This article will examine the intended operation of the new Act, its initial judicial interpretation and determine whether it is likely to be successful as the Attorney declared in clarifying the operation of the law in this area.

II BAD CHARACTER EVIDENCE

Bad character evidence is variously and often confusingly referred to in the literature under many different labels,[22] including: discreditable conduct, misconduct, propensity, similar fact, narrative, coincidence, tendency, relationship, context, background and uncharged acts.[23] For consistency purposes, this article will use the term 'bad character' evidence when referring to this type of evidence as a whole, but will distinguish between the terms 'discreditable conduct,' 'propensity,' 'similar fact,' and 'evidence of uncharged acts' when discussing the specific application of the new law, using the terms from the new Act and as explained by the Attorney-General in his Second Reading Speech.[24]

This article now explains the context of the new Act by outlining the history of the use of bad character evidence in the Australian common law. It does this because the new Act is based on the common law, but clarifies and modifies the common law in places.

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[21] Ibid s 34R. It is accepted that most criminal trials in practice are heard in the absence of a jury, either by magistrates or a judge sitting alone, but the procedures involved in trial on indictment before a jury are widely recognised as the 'gold standard' of criminal justice to be applied regardless of the level of the criminal court. See Andrew Sanders, 'Core Values, the Magistracy and the Auld Report' (2002) 29 *Journal of Law and Society* 324, 339; *R v Stipendiary Magistrate for Norfolk, ex parte Taylor* [1998] Crim LR 276, 277.

[22] See, eg, Jonathan Clough, '*Pfennig v The Queen*: A Rational View of Propensity Evidence' (1998) 20 *Adelaide Law Review*, 287; Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161; Queensland Law Reform Commission, above n 11, 131, [5.1].

[23] This is far from an exhaustive list.

[24] Rau, above n 1, 3288.

A *Is Bad Character Evidence Relevant?*

For evidence to be admissible under the Australian common law it must be relevant, that is, that it could 'rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding.'[25]

Bad character evidence often fulfils this definition of relevance. Evidence of misconduct which is of the same general character or shares common features with the misconduct at issue often has logical relevance. This is because it demonstrates the tendency of an accused to act in a certain way.[26] 'Bad character' as Palmer notes, 'is just as relevant to guilt as good character, one need go no further than recidivism statistics to prove this.'[27] Cossins notes, for example with reference to sexual offences committed on children that the 'literature shows that "one of the best predictors of sexual recidivism is a previous sex offense" conviction along with prior charges.'[28] Hamer asserts that a jury hearing a sexual assault trial 'would be justified in considering it highly probative that a defendant has

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[25] *Goldsmith v Sandilands*, (2002) 76 ALJR 1024, 1029 (Gleeson CJ).

[26] See, eg, Kenneth Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties?' (1999) 23 *Melbourne University Law Review* 263, 268; David Culberg, 'The Accused's Bad Character – Theory and Practice' (2009) 8 *Notre Dame Law Review* 1343, 1350-1351; Rachel Tandy, 'The Admissibility of a Defendant's Previous Criminal Record: A Critical Analysis of the *Criminal Justice Act* 2003' (2009) 30(3) *Statute Law Review* 203, 213.

[27] Palmer, above n 22, 170.

[28] Annie Cossins, 'The Behaviour of Serial Child Sexual Offending: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821, 840, quoting David Greenberg et al, 'Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator' (2000) 24 *Child Abuse & Neglect* 1485, 1491. Hamer, for example, notes that a person who is released from prison for having committed a sexual offence is about 60 times more likely to be convicted for another sex offence within the next 12 months than someone without a prior conviction. See David Hamer, 'Probative but still Prejudicial? Rethinking Exclusion of Propensity Evidence in Sexual Offence Cases,' University of Sydney, Legal Studies Research Paper no. 10/21, February 2010, <http://ssrn.com.abstract=1548196>, 6.

committed a sexual assault on another occasion.'[29] Bagaric and Amarasekara assert that for serious crimes such as rape and armed robbery, 'there is only a very small class of people who are prepared to engage in such conduct, hence evidence that the accused is a member of such a class is extremely powerful.'[30] It is therefore right that the new Act reflects the common law approach as to the relevance of bad character evidence.

B *Is Bad Character Evidence Unduly and Unfairly Prejudicial?*

Though relevant, the common law has long regarded evidence of an accused's bad character with great suspicion,[31] taking the view that it should normally be inadmissible[32] (though in practice this rule has never been as rigidly applied as judicial declarations might indicate).[33] As Hayne J recently explained, 'The common law recognised long ago the force of the proverb "give a dog an ill name and hang it."'[34]

At common law, the use of bad character evidence has been restricted, particularly when relied upon as tendency or similar fact evidence, not because it is 'irrelevant' but because it conflicts with the fundamental principle that while all relevant evidence is *prima facie* admissible, evidence that is unduly or unfairly prejudicial

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29 Ibid. See also Cossins, above n 28, 835, 840, 862.

30 Bagaric and Amarasekara, above n 13, 90.

31 See Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1933) 46 *Harvard Law Review* 954 for a detailed discussion of the historical development of the rule in England. The rule can be traced back to as early as 1692, see *R v Harrison* (1692) 12 How St Tr 833, 864.

32 Richard Mahoney, 'Similar Facts' (2009) 55 *Criminal Law Quarterly* 22.

33 This type of evidence was historically used without objection as what might now be termed as 'context,' 'background' or 'relationship' evidence and not subject to the exclusionary rule identified in *Makin v Attorney-General of New South Wales* [1894] AC 57. See, eg, *R v Dowsett* (1846) 2C, K306; *R v Rearden* (1864) 4F, F76; *R v Buckley* (1873) 13 Cox CC 293, *R v Bond* [1906] 2KB, 389, 401.

34 *R v BBH* (2012) 286 ALR 89, [71].

should nevertheless be excluded.[35] A dominant fear surrounding the use of bad character as evidence at trial is the concern that this information will be misused by the jury[36] because it may be that 'once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality.'[37] The difficulty, as observed by the Supreme Court of Canada, is containing the effects of such information which, once dropped like poison in the juror's ear, 'swift as quicksilver it courses through the natural gates and alleys of the body,'[38] discouraging or inhibiting the jury from accurately applying the criminal standard of proof, which requires the accused to be given the benefit of reasonably possible doubts open on the evidence.[39]

However, in recent years, the traditional rule excluding bad character evidence has proved to be a 'minefield'[40] or a 'pitted battlefield.'[41] Once described as 'one of the most deeply rooted and jealously guarded principles of our criminal law,'[42] the rule of the

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35 See, eg, Clough, above n 22, 287-288; *R v BBH* (2012) 286 ALR 89, [70]; TRS Allen, 'Similar Fact Evidence and Disposition: Law, Discretion and Admissibility' (1985) 48 *Modern Law Review* 253, 256. See further *R v Harriman* (1989) 167 CLR 590, 599-601 (McHugh J); Australian Law Reform Commission, *Character and Conduct (Evidence Research Paper 11)* (ALRC, 1985) 30-35; Bagaric and Amarasekara, above n 13, 77-83; for an overview of the arguments against the introduction of bad character evidence.

36 See, eg, Roselle Wissler and Michael Saks, 'On the Inefficacy of Limiting Instructions' (1985) 9 *Law and Human Behavior* 37; Roderick Munday, 'Comparative Law and English Law's Character Evidence Rules' (1993) 13 *Oxford Journal of Legal Studies* 589; Edith Greene and Mary Dodge, 'The Influence of Prior Record Evidence on Juror Decision Making' (1995) 19 *Law and Human Behaviour* 67; Sally Lloyd-Bostock, 'The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2000] *Criminal Law Review* 734.

37 *United States v Burkhart* (1972) 458 F 2d 201, 204 (Doyle J).

38 Hamlet, Act I, Scene v, ll. 66-67, quoted in *R v Handy* [2002] 2 SCR 908, [40] (Binnie J).

39 See, eg, *R v Pfennig* (1995) 182, CLR 461, 512-513 (McHugh J); Wendy Harris, 'Propensity Evidence, Similar Facts and the High Court' (1995) 11 *Queensland University of Technology Law Journal* 97, 119.

40 NZLRC, above n 10, [2.17].

41 *DPP v Boardman* [1975] AC 421, 445 (Lord Hailsham).

42 *Maxwell v DPP* [1935] AC 309, 317 (Lord Sankey).

exclusion of bad character has been increasingly challenged.[43] The rule has been increasingly criticised over recent years as over-complicated and inconsistent[44] and as unduly favouring the guilty.[45] Indeed, Hamer contends that 'it is not just the exact form of the rule that is contested, but the rule's very existence.'[46] Commentators and judges fundamentally disagree on whether and in what circumstances evidence of bad character ought to be admissible in criminal proceedings.

This article argues that it would be contrary to the habitual and well-developed instincts of the members of the jury to stipulate that, as an entire category, bad character evidence should always be excluded on the basis that it is unduly and unfairly prejudicial. Its exclusion has never been stipulated in this absolute way by the common law, and in practice people make decisions every day guided by their judgments about the characters of others. Rather than being given blanket exclusion, it is far better that bad character evidence be admitted and subject to judicial direction focused on mitigating its dangers, or that it be excluded on grounds based on the particular circumstances of the case. It is right that the new Act deems that bad character evidence should not, *prima facie*, be excluded as being unduly or unfairly prejudicial.

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43 See, eg, David Nason, 'Jurors to hear Prior Crimes', *The Australian*, 8 March 2010; H Wilcox, 'Keeping the Jury in the Dark' (1992) 138 *New Law Journal* 245, Mike Redmayne, 'The Relevance of Bad Character' (2002) 61 *Cambridge Law Journal* 684.

44 See, eg, Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Commission, 2001) 2, [1.7]; Rau, above n 1, 3289, 3294; John Spencer quoted by Sir Robin Auld, *Review of the Criminal Courts in England and Wales* (HMSO, 2001) [11.118]-[11.119].

45 See, eg, Spencer, above n 44; John Spencer, *Evidence of Bad Character (2nd ed)* (Hart Publishing, 2006) 3; CR Williams and Sandra Draganich 'Admissibility of Propensity Evidence in Paedophilia Cases' (2006) 11 *Deakin Law Review* 1, 32.

46 Hamer, above n 28, 1.

C *Bad Character Evidence in South Australia*

It is 'the time honoured law,' as Lord Loreburn asserted in *R v Ball*,[47] 'that you cannot convict a man of one crime by proving that he had committed some other crime.'[48] The common law, as with the new Act,[49] remains based on the principles articulated by Lord Hershell in his oft quoted judgment in *Makin v Attorney-General of New South Wales*.[50] To paraphrase, his Lordship held on the one hand that evidence revealing that the accused had committed prior unlawful acts is inadmissible when it would be used merely to suggest that the accused is someone likely, due to their criminal character, to have committed the offence for which they were being tried. The new Act seems to enact at least the initial part of the *Makin* formulation in section 34P(1)(a). However, Lord Hershell reasoned on the other hand that the mere fact that the evidence adduced tended to show the commission of other crimes, did not render it inadmissible if it was relevant to a live issue before the jury. He explained that such evidence may be relevant if, for example, it bore on the question whether the alleged criminal acts were intentional or accidental, or to rebut a defence which would otherwise be open to the accused.[51] The exact scope of *Makin* has never been settled and one might question whether its controversial formulation should ever be enacted in legislation.[52]

The High Court in *R v Pfennig*[53] offered a much criticised effort to apply the 'inherently contradictory'[54] two principles identified in

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47 [1911] AC 47.
48 Ibid 71.
49 Rau, above n 1, 3290.
50 [1894] AC 57.
51 Ibid 65.
52 A detailed discussion of the development and application of the conflicting principles identified in *Makin* as to the use of bad character evidence is beyond the scope of this article. Indeed, Mirfield argues that such an exercise is fruitless and Lord Hershell's famous test in *Makin* is valueless and should be consigned to the scrapheap. See Peter Mirfield, 'Similar Facts – *Makin* Out?' (1987) 46 *Cambridge Law Journal* 83-105.
53 (1995) 182 CLR 461.
54 Clough, above n 22, 289; Arenson, above n 2, 34.

Makin.[55] *Pfennig* remains the leading common law authority in Australia governing the admissibility of bad character evidence when adduced as propensity or similar fact evidence.[56]

The proposition laid down in *Pfennig* in the joint majority judgment of Mason CJ, Deane and Dawson JJ, is based on the traditional view that it is too dangerous to admit this type of evidence. The majority held that the admission of bad character evidence may well have an unfairly prejudicial effect because the jury might give it too much weight in determining guilt.[57] The majority held, refining and arguably extending *Makin*, that where such evidence is intended to be used for propensity or similar fact reasoning (i.e. to directly reason that the accused is more likely to have committed the present crime because he or she has done similar to it or even something criminal before),[58] the evidence is inadmissible unless there is, in light of all the evidence, no reasonable explanation for the existence of the evidence other than the inculpation of the accused for the offence charged. That is, the evidence is admissible when there is no reasonable explanation for the evidence which is consistent with the accused's innocence.[59] Only when this stringent test of admissibility has been satisfied will the court consider that the jury is capable of giving appropriate

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[55] It is difficult, if not impossible, to reconcile the two principles identified in *Makin*. See, eg, ibid 34-35; CR Williams, 'The Problems of Similar Fact Evidence' (1979) 5 *Dalhousie Law Journal* 281, 283.

[56] Though with statutory intervention in the other states, only Queensland remains largely governed by the common law in this area.

[57] (1995) 182 CLR 461, 487 (Mason CJ, Deane and Dawson JJ).

[58] There has been much confusion whether this test extends to the admissibility of bad character evidence adduced for non-similar fact or propensity reasoning; see Queensland Law Reform Commission, above n 11, 134, [5.12]. Though the stronger view is that the *Pfennig* test does not apply to such evidence: see, eg, *R v Nieterink* (1999) 76 SASR 56; *R v Conway* (2000) 172 ALR 185, [95]. The issue remains far from resolved, especially after the inconclusive decision on point of the High Court in *R v HML* (2008) 235 CLR 334. See, eg, *R v Ellis* [2010] SASCFC 118, [100]. The recent decision of the High Court in *R v BBH* (2012) 286 ALR 89 adds to the confusion. See further the discussions below in sections II(b) and IV.

[59] *R v Pfennig* (1995) 182 CLR 461, 481-482 (Mason CJ, Deane and Dawson JJ). This test was adopted from *R v Hoch* (1988) 182 CLR 292, 294.

weight to the evidence. Factors that would allow the evidence to satisfy the test include the 'striking similarity, underlying unity or signature pattern common to the incidents disclosed by the totality of the evidence.'[60]

The *Pfennig* test has been strongly criticised in both Australia[61] and overseas.[62] It has been rejected in the *Uniform Evidence Act* jurisdictions[63] and in Western Australia[64] and now South Australia. The *Pfennig* test is said to involve 'too great an intrusion by the trial judge in the fact finding mandate of the jury'[65] and to set far too high a test for the admission of evidence of bad character.[66] The view of the Australian Law Reform Commission was that the *Pfennig* test is 'too narrow and should not be the test for admission.'[67] Subsequent

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60 (1995) 182 CLR 461, 488 (Mason CJ, Deane and Dawson JJ).

61 See, eg, Arenson, above n 26, 273; Australian Law Reform Commission, *Review of the Uniform Evidence Acts (Discussion Paper 69)* (ALRC, 2005) [10.48]; Australian Law Reform Commission, *Uniform Evidence Law (Report 102)* (ALRC, 2006) 383-384, [11.63]-[11.68]; Jeremy Gans, 'Similar Facts after *Phillips*' (2006) 30 *Criminal Law Journal* 224; Hamer, above n 28, 10; Queensland Law Reform Commission, above n 11, 442, [13.72].

62 See, eg, *R v Handy* [2002] 2 SCR 908, [92]-[97] (Binnie J); Law Commission, above n 44, 140-141, [11.11]-[11.13].

63 New South Wales, Tasmania, the ACT, Victoria, the Commonwealth and the Northern Territory. See further, ALRC (2006) above n 61, [11.65]-[11.68].

64 See *Evidence Act 1906* (WA) s 31A, inserted by the *Criminal Law Amendment (Sexual Assault and Other Matters) Act* 2004 (WA), s 13.

65 *R v Handy* [2002] 2 SCR 908, [93] (Binnie J). See also, *R v Handy* [2002] 2 SCR 908, [97] (Binnie J); ALRC (2006), above n 61, [11.67]; Arenson, above n 2, 37; Clough, above n 22, 297; Williams and Draganich, above n 45, 15.

66 See, eg, Arenson, above n 26, 273; Clough, above n 22, 312; Andrew Palmer, '*R v Pfennig*: Two Versions of the Similar Fact Rule' (1995) 20 *Melbourne University Law Review* 600, 614; Rajir Nair, 'Weighing Similar Facts and Avoiding Prejudice' (1996) 112 *Law Quarterly Review* 262, 272.

67 Australian Law Reform Commission (2005), above n 51, [10.48]. This criticism of the *Pfennig* test was echoed during the Parliamentary debate on the new Act by various contributors, including the Shadow Attorney-General, the Hon. Stephen Wade MLC; the Hon. Vicki Chapman MP and the Hon. Dennis Hood MLC, who cited the controversial South Australian case of Frank Mercuri as an example of the shortcomings of the common law rules as to the admission and use of bad character evidence. See Wade, above n 12, 3742 3743; Chapman, above n 12, 4636-4637; Dennis Hood, South Australia, *Parliamentary Debates*, Legislative Council, 13 September 2011, 3744-3745.

cases to *Pfennig* have illustrated that it can be very difficult in practice for bad character evidence to possess the requisite degree of cogency under the *Pfennig* test to render it admissible.[68] The South Australian Attorney-General condemned the *Pfennig* test as having 'the practical effect of excluding highly reliable and probative evidence'[69] because it is 'technical, complex and too restrictive.'[70]

The problems and criticisms of *Pfennig* were compounded by the confusion created by the unsatisfactory decision of the High Court in 2008 in *R v HML*.[71] In *HML* three judges; Gummow, Kirby and Hayne JJ, considered that the *Pfennig* test applied to evidence of bad character, whatever the ostensible purpose of its admission.[72] However, three members of the court; Gleeson CJ and Crennan and Kiefel JJ, held that it did not.[73] The final member of the court, Heydon J, considered it unnecessary to resolve the issue[74] (despite Kirby J's call for him to do so, given the importance of the High

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Mercuri was acquitted in 1998 of the murder of Shirree Turner. However, after the acquittal it was revealed that Mercuri had previously been convicted for the stabbing and attempted murder of a woman in Victoria in very similar circumstances and that he had been convicted on 48 prior occasions for other offences, including violent crimes with very similar facts. This material was not allowed to be introduced as evidence at his trial for the murder of Shirree Turner. Later, Mercuri went on to kill another woman, before committing suicide. If the highly probative evidence of Mercuri's past actions had been adduced, leading to conviction, it is quite possible that Mercuri would not have been free to murder his third victim. However, the *Pfennig* test prevented this, which illustrates how demanding the test is. It is likely, noting the views expressed in Parliament, that this evidence would have been admissible under the new Act.

68 See, eg, *R v Phillips* (2006) 225 CLR 303. This decision has been particularly criticised for its application of the 'no rational inference' test. See David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609.

69 Rau, above n 1, 3289.

70 Ibid. See also Hamer, above n 68, 613-614.

71 (2008) 235 CLR 334.

72 *Pfennig* (1995) 182 CLR 461, [59] (Kirby J), [106] (Hayne J with whom Gummow J agreed).

73 Ibid [27] (Gleeson CJ); [455] (Crennan J), [511]-[512] (Kiefel J).

74 Ibid [335].

Court arriving at a clear majority on such an important issue).[75]

HML heightened the need for reform in this area. Given all this, it is unsurprising that the South Australian government recently with all party support in Parliament amended the State's laws of bad character evidence by passing the new Act.

III THE OPERATION OF THE NEW ACT; BAD CHARACTER EVIDENCE GENERALLY

The new Act was designed to simplify and clarify the common law. However, whether the new Act will operate this way in practice is unclear. The new Act is not radical or revolutionary. Though section 34O(1) provides that the new Act 'prevails over any relevant common law rule of admissibility of evidence to the extent of any inconsistency,' it is clear that the new Act continues be influenced by the common law with respect to its treatment of propensity and similar fact evidence as well as evidence of uncharged acts.[76] However, the Act is chiefly designed to overcome a number of recent decisions of the High Court,[77] in particular *Pfennig* and *HML*.

The new Act contains three different rules governing the use and admissibility of bad character evidence – or, as section 34P refers to it, 'discreditable conduct.'

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[75] Ibid [82]). See further, David Hamer, Admissibility and Use of Relationship Evidence in *HML v The Queen*: One Step Forward, Two Steps Back' (2008) 32 *Criminal Law Journal* 351, 351-352.

[76] Rau, above n 1, 3290, 3291.

[77] Ibid. See the cases noted above n 4.

A *The general prohibition on using bad character evidence in s 34P(1)*

Section 34P(1) of the new Act provides that:

> In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence ("discreditable conduct evidence") –
> (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and
> (b) is inadmissible for that purpose ("impermissible use"); and
> (c) subject to subsection (2), is inadmissible for any other purpose.

This section preserves the first principle stated in *Makin*, preventing the introduction of evidence to show that the defendant is more likely to have committed the offence because he or she has engaged in other discreditable conduct. In other words, it precludes evidence used simply to show the 'mere' or 'general' criminal propensity of the accused.

B *The exception to the rule in s 34P(2)(a)*

Section 34P(2)(a) of the new Act provides that:

> Discreditable conduct evidence may be admitted for a use (the "permissible use") other than the impermissible use if, and only if –
>
> (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant;

The second principle from *Makin* accepts that there may be circumstances where bad character evidence is, nevertheless, relevant and admissible. Section 34P(2) reflects and modifies this

rule.[78] It is suggested that the section provides that such evidence may be admitted if adduced for a permissible purpose beyond showing a 'mere' or 'general' propensity to commit bad acts. The provision at literal face value may appear to be at odds with such a construction and the provision will always exclude propensity reasoning. After all the words 'mere' and 'general' are not in section 34P(1)(a). However, these expressions must appear via the use of the words 'suggest' and 'more likely' in section 34P(1) and especially because section 34P(2)(b) expressly envisages that a 'particular propensity' may become admissible as 'circumstantial evidence of a fact in issue'. The Attorney-General's comments in the Second Reading Speech indicate that this is the correct understanding of the intended operation of the new Act.[79] The distinction between a 'general' or 'mere' and a 'particular' propensity may be a fine one, but it is, nevertheless, one clearly recognised at common law[80] and continues to be under the new Act.

The section provides as a basic requirement that discreditable conduct evidence may be admitted in circumstances where its probative value in the particular case substantially outweighs any prejudicial effect it may have on the defendant. The section describes this as the 'permissible use' of such evidence. Exactly what is meant by the requirement that the probative value should 'substantially outweigh' any prejudicial effect is left undefined in the new Act. The use of the term 'substantially' is difficult to assess and it is unclear what effect the term will have in the new Act in tilting the scales for or against the admissibility of bad character evidence adduced for a permissible purpose.[81] 'In truth,' as Williams and Draganich observe, 'the word "substantially" can probably have as much or as little effect as the individual judge wishes.'[82] At both common law and under the new Act, a trial judge will have considerable discretion in this regard.

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78 Rau, above n 1, 3290. Even at common law, there has never been an absolute prohibition on the use of bad character evidence. See Hamer, above n 68, 611.

79 Rau, above n 1, 3290-3291.

80 See, eg, *R v Harriman* (1989) 167 CLR 590, 613 (Gaudron J).

81 Williams and Draganich, above n 45, 18.

82 Ibid.

The Attorney-General explained in his Second Reading Speech that to satisfy the test in section 34P(2)(a) the trial judge must determine if there would be 'an unacceptable risk of prejudice to the accused so that his or her trial would be unfair if the evidence of discreditable conduct were to be admitted.'[83] He explained that 'prejudice' in this context means more than just detriment to the accused but rather the risk of an unfair trial and wrongful conviction.[84]

The new statutory test that the probative value should 'substantially outweigh' its prejudicial effect was considered by Anderson J in *R v Gardiner*,[85] the first decision to have considered the new Act in any detail. The accused was charged with the murder of his girlfriend. Anderson J considered the admission and use of evidence that demonstrated the accused's violent and unhealthily possessive conduct towards the deceased. He rejected the view that 'substantially outweighs' equated to proof beyond reasonable doubt[86] or was a reformulation of the no rational inference *Pfennig* test.[87] However, he accepted the defence's contention[88] that the bar for admissibility of uncharged acts under the new Act had been raised.[89] Anderson J thought Parliament's choice of the phrase 'substantially outweighs' intended something more than proof beyond the balance of probabilities.[90] Anderson J drew on the interpretation of the identical term in the UEA[91] and stated the term 'well outweighs' was 'a good and convenient way of considering the balance to be struck between the probative value versus the prejudicial effect on the accused in the wording of the new legislation.'[92]

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83 Rau, above n 1, 3290.
84 Ibid.
85 [2012] SASC 160.
86 Ibid [85].
87 Ibid [94]-[98]. Anderson J quoted *R v Ellis* (2003) 58 NSWLR 700 with evident approval.
88 [2012] SASC 160, [52]-[57].
89 Ibid [99].
90 Ibid [85].
91 See *Uniform Evidence Act* s 135; *R v Clark* (2001) 123 A Crim R 506, [163].
92 [2012] SASC 160, [94].

Anderson J was satisfied that the probative value of the violent and possessive history in *Gardiner* 'substantially outweighs' or 'well outweighs' the prejudicial effect upon the accused. His Honour admitted the evidence, 'not for the impermissible use of propensity reasoning ... but as relevant background relationship evidence.'[93] He reasoned that without such evidence 'there would be an unsatisfactory and artificial history of the relationship available.'[94] The 'background' evidence was clearly relevant and 'important,'[95] proving significant in assisting Anderson J to find Gardiner guilty of murder. The evidence in *Gardiner* assisted Anderson J, not in showing any propensity by the accused to commit the alleged offence, but rather in setting the scene in which the alleged offence occurred, in showing the accused's state of mind, and in showing how the deceased died and whether it was murder or an accident.

However, two aspects of Anderson J's judgment appear questionable; first, his view that the standard relating to the admission of evidence of uncharged acts is now higher.[96] Given that the new Act is intended, as the Attorney made clear,[97] to dispel the suggestion of some members of the High Court in *R v HML*[98] (and now *R v BBH*)[99] that the *Pfennig* 'no rational inference' test always applied to evidence of uncharged acts, it is with respect difficult to understand Anderson J's observation that the new Act has increased the bar for the admissibility of such evidence. Secondly, Anderson J's interpretation of 'substantially outweighs' as being beyond the 'balance of the probabilities' does not reflect the intention of the new Act. Similar criticism can be made to the passing comment of Judge Cuthbertson in *R v C*[100] that evidence of uncharged acts under the

93 Ibid [101]-[102].
94 Ibid [100].
95 Ibid [69].
96 Ibid [99].
97 Rau, above n 1, 3291.
98 (2008) 235 CLR 334. See David Hamer, 'The Admissibility and Use of Relationship and Propensity Evidence after *HML v The Queen* (2008) 235 CLR 334' (Paper presented at University of Queensland Current Legal Issues Seminar, Brisbane, 30 July 2009), 1.
99 (2012) 286 ALR 89. See further, below n 184.
100 [2013] SADC 16.

new Act should be proved on the 'balance of probabilities.'[101] Such references are unhelpful. The test of admissibility under the new Act is one of balancing probative value against prejudicial effect – it should involve a weighing up of these two variables, but both Anderson J and Cuthbertson DCJ cast the test in the language of the estimation of probability. It is suggested that the view of Slattery DCJ is to be preferred where he observed that, whilst the expressions 'substantially' and 'strong probative value' 'do not easily lend themselves to definition,' in his opinion 'because they are in the nature of exceptions creating the permissible use, they should not be quantified in a percentage or other way. They are matters for the trial Judge in the application of principle.'[102]

Finally, the new Act provides that the purpose, whatever it may be,[103] for which the evidence is adduced must be specified by the prosecution, who must give 'sufficient particularity of the purpose it contends for the admission'[104] of the evidence. The prosecution, as in the UEA jurisdictions,[105] must clearly specify why the evidence is relevant and properly admissible in the particular facts and issues of the case.[106] This means that discreditable evidence, even if highly

[101] Ibid [35].

[102] *R v Fisher and Ors (No 2)* [2013] SADC 14, [41].

[103] The evidence may be adduced for propensity or similar fact reasoning or it may be introduced for a more limited purpose such as providing context, background or relationship. See Rau above n 1, 3292. See further the discussion below in section V.

[104] Rau, above n 1, 3292.

[105] See, eg, *R v Qualitieri* (2006) 171 A Crim R 663, [80]-[82]; *R v DJV* [2008] NSWCCA 272, [28]-[31]; *R v AN* (2000) 117 A Crim R 176.

[106] Rau, above n 1. 3292; *R v Fisher and Ors (No 1)* [2012] SADC 186, [53]-[54]. A potential oversight in the new Act, raised to the authors by Tim Preston of the South Australian DPP, concerns the requirement upon the prosecution to serve notice of its intention to use discreditable conduct where as part of the immediate *res gestae* of the alleged offence, there is discreditable conduct beyond the strict offence charged. In a charge of assault, must the prosecution serve notice of its intention to adduce as evidence the threat of violence that immediately preceded the assault and previously would have been led without objection? Or what of the need to serve prior notice in a case of possession with intent to supply drugs where the prosecution relies on evidence to show

probative, will not be admissible if the prosecution cannot specify just how it is properly relevant to the facts in issue. This requirement goes some way to advancing an articulated purpose of the new Act; that the law and its use regarding evidence of bad character should become clearer.

IV THE OPERATION OF THE NEW ACT IN RELATION TO PROPENSITY AND SIMILAR FACT EVIDENCE; s 34P(2)(b)

Section 34P(2)(b) of the new Act deals with propensity evidence and indirectly similar fact evidence as this type of evidence relies on propensity reasoning. The article will first define those types of evidence and explain how the common law treats them, then the article will analyse section 34P(2)(b).

Section 34P(2)(b) of the Act operates 'in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue.' The discreditable conduct evidence may be admitted for a 'permissible use' if both that its probative value substantially outweighs its prejudicial effect under section 34P(2)(a), and, 'the evidence has strong probative value having regard to the particular issue or issues arising at trial.'

Therefore, in addition to the basic requirement in section 32P(2)(a) that the probative value of the similar fact or propensity evidence must 'substantially' or 'well' outweigh its prejudicial effect, the new Act in section 34P(2)(b) imposes a further test. The subsection covers (or is at least intended to cover) what the Attorney-General describes as similar fact or propensity evidence

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the accused had engaged in other deals? Such a requirement is considerable and arguably unnecessary.

given that both types of evidence ultimately depend for their probative value upon the defendant's particular disposition to act in a certain way.[107] In cases of similar fact or propensity evidence, the test to be applied by section 34P(2)(b) requires that the probative value must not only substantially outweigh any prejudicial effect, but also that the evidence must have 'strong probative value' having regard to the particular issues or issues arising at trial. As the Chief Justice recently explained in *R v Cashion*,[108] 'The purpose ... is to ensure that every use made of the discreditable conduct evidence is a use which satisfies the test for admissibility set in s 34P, namely that the probative value of the evidence for a particular use outweighs its prejudicial effect, *and if the use relies on propensity, that it is strongly probative* [authors' emphasis].'[109]

A *Propensity Evidence*

Propensity evidence, unlike similar fact evidence, will typically arise when the accused's commission of the other acts of discreditable conduct is 'clear cut'[110] from the outset.[111] Propensity evidence in the context of the new Act means more than simply a 'mere' or 'general' propensity towards discreditable conduct as this type of reasoning is an 'impermissible purpose' within the Act and is precluded by the first principle of *Makin*. Rather, propensity evidence within the new Act is evidence of discreditable conduct that demonstrates that an accused has a particular tendency to act in

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[107] See, eg, Hamer, above n 68, 620; Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) 185; Stephen Odgers, *Uniform Evidence Law (10th ed)* (Lockwood & Co, 2012) 523, [1.3.7350]; David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 23 *Monash University Law Review* 137, 159-161.

[108] [2013] SASCFC 14.

[109] Ibid [31] (Kourakis CJ). See also *R v Fisher and Ors (No 2)* 14 [2013] SADC [35]-[36].

[110] Hamer, above n 68, 619.

[111] Ibid; Hamer, above n 107, 158-159; Andrew Palmer, 'Propensity, Coincidence and Context: the Use of Extraneous Misconduct Evidence in Child Sexual Abuse Cases' (1999) 4 *Newcastle Law Review* 46, 81.

a certain criminal manner,[112] disclosing a 'hallmark,'[113] some 'unusual or unique features which render it improbable that anyone else had a like propensity … in that situation the evidence establishes much more than mere propensity.'[114] From this disposition of the accused to commit discreditable acts of such a particular kind, it may be inferred, if there is a high degree of similarity or singularity between the alleged offence and the other misconduct, that the accused also committed the alleged offence.[115]

However, it is important not to overstate the requirement for some unusual feature.[116] The 'unusual' feature may not be 'unusual' in itself but arise, as Dawson J observes, from an accumulation of 'common features.'[117] As Sklar states, 'It is not only striking similar … evidence that possesses the necessary high degree of probative strength. An item of … evidence may gain admissibility merely because it is "similar." Everything depends on the particular evidence and issues in the case.'[118]

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[112] Rau, above n 1, 3288.

[113] Ronald Sklar, 'Similar Fact Evidence – Catchwords and Cartwheels' (1979) 23 *McGill Law Journal* 60, 62, 70.

[114] *R v Harriman* (1989) 167 CLR 590, 613 (Gaudron J). See also Harris, above n 39, 112, 118.

[115] Hamer, above n 68, 619. See also *R v Mokaraka* [2002] 1 NZLR 793, [48]; Hamer, above n 107, 151; Palmer, above n 111, 53-54. The English case of *R v Straffen* [1952] 2 QB 911 is often cited as a classic example of the use of propensity evidence in this context. See Arenson, above n 2, 40, n 44; Sklar, above n 113, 69.

[116] See, eg, Williams and Draganich, above n 45, 28, 32; Cossins, above n 28, 862-863.

[117] *R v Sutton* (1984) 152 CLR 528, 567, See also, eg, *R v B(L)* (1997) 116 CCC (3d) 481; *R v Ford* [2009] NSWCCA 306, [38]-[45]; *R v Liddy* (2002) 812 SASR 22. This is an important point in practice. An insistence upon too unusual or peculiar feature or modus operandi, especially in cases of sexual assault involving children, fails to accord with the reality of how such crimes are typically committed: see Williams and Draganich, above n 45, 24; Cossins, above n 28, 856, 858, 862-863. Such insistence also unduly undermines the effective prosecution of such crimes: see Cossins, above n 28, 855-856, 858-859, 863; Williams and Draganich, above n 45, 17, 28, 31-32.

[118] Sklar, above n 113, 79.

The *Pfennig* test, as Hamer observes, sets such a high test of admissibility, that in very few cases in practice would this test be capable of satisfaction.[119] In contrast, while not going so far as to routinely admit propensity evidence, by abolishing the *Pfennig* test the new Act will allow it to be adduced as circumstantial evidence of a fact in issue where it has 'strong probative value' due to the nature of the case.

B *Similar fact evidence*

Similar fact evidence in the context of the new Act is described by the Attorney-General as evidence of multiple examples of similar conduct led to establish that the accused committed a particular act.[120] The discreditable conduct evidence is led to establish the objective implausibility or improbability of the occurrence of all the events, both the alleged misconduct and the alleged offence, other than through design by the accused.[121] McHugh J in *Pfennig* explained this reasoning as follows:

> In similar fact evidence cases ... the evidence is often admitted for the reason that the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is an innocent explanation for the accused's involvement in the matter.[122]

Cases such as *Makin*,[123] *R v Smith*[124] (the famous Brides in the Bath case) or *R v Perry*[125] illustrate this line of reasoning. The issue is

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[119] Hamer, above n 68, 613. Though see further, below n 188.
[120] Rau, above n 1, 3288.
[121] Arenson, above n 2, 39. See also, Mike Redmayne, 'A Likely Story' (1999) 19 *Oxford Journal of Legal Studies* 659.
[122] (1995) 182 CLR, 461, 530.
[123] See L Hoffman, 'Similar Fact Evidence after *Boardman*' (1975) 91 *Law Quarterly Review* 198, 199.
[124] (1911) 11 Cr App R 229.
[125] (1982) 150 CLR 580. See Hamer, above n 68, 619. See also *R v Geering* (1849) 18 LJMC 215; *R v Grills* (1954) 73 WN (NSW) 303 for other examples of similar fact or coincidence reasoning.

whether an event which undoubtedly occurred – the death of a baby as in *Makin*, the drowning of a bride in a bath on her honeymoon as in *Smith* or the poisoning by arsenic of a spouse or relative as in *Perry* – occurred by accident or by design.[126] The connection of the accused with so many similar events is intended to eliminate the possibility of coincidence.[127] Palmer describes this as the 'doctrine of chance.'[128] As Binnie J observes, 'Coincidence, as an explanation, has its limitations. As it was put in one American case: "The man who wins the lottery once is envied; the one who wins it twice is investigated."'[129]

Unlike with propensity evidence, similar fact evidence typically arises when the accused denies committing any of the alleged acts, whether the alleged offences or the alleged acts of misconduct.[130] Indeed, the accused may even question whether there has been any misconduct.[131] Such evidence as Carter observes, 'merely indicates his involvement in the repetition of a pattern of similar events which is unlikely to have resulted from coincidence or "accident."'[132]

However, similar fact reasoning is not confined to the association of the accused with an event that definitely happened such as the death of a child in *Makin* or the drowning of a bride in *Smith*. Similar fact reasoning is also relevant to situations of multiple similar accusations, usually of a sexual nature, against the same individual(s).[133] The prosecution in such cases rests upon a 'coincidence of story' as opposed to a 'coincidence in the facts' (as

[126] Palmer, above n 111, 71.
[127] Ibid.
[128] Ibid.
[129] *R v Handy* [2002] 2 SCR 908, [45] quoting *United States v York* (1991) 933 F2d 1343, 1350.
[130] Palmer, above n 111, 54, 71; Hamer, above n 68, 619-620; Hamer, above n 107, 158-159.
[131] Hamer, above n 68, 620. See, eg, *R v Perry* (1982) 150 CLR 580.
[132] P Carter, 'Forbidden Reasoning Permissible: Similar Facts a Decade after *Boardman*' (1985) 48 *Modern Law Review* 29, 31.
[133] See, eg, Cossins, above n 28, 852-853; Palmer, above n 111, 70-71. *DPP v Boardman* [1975] AC 421 is an example of such reasoning.

in *Makin* and *Smith*).[134] However, this reasoning also involves 'the doctrine of chance.' The question is whether, when judged by experience and common sense, the similar complaints must be true. As Palmer observes, 'The prosecution's argument is that it is so improbable that similar complaints could have been made coincidentally, that there must another explanation for the occurrence of these related events, namely that the accused did the [criminal] acts alleged.'[135] The probative value of the accounts given by the complainants will depend on their degree of similarity to each other.[136] 'It stands to reason that in this type of case, the more similar the complaints are, the higher the probative value.'[137]

Indeed, in both the situations of 'coincidence of facts' and 'coincidence of stories,' the similar fact reasoning depends for its cogency or probative value upon propensity reasoning. Similar fact evidence inevitably requires propensity reasoning.[138] As Redmyane notes, 'without the assumption that criminals stick to various *modus operandis* (broadly conceived), there would be no similar fact cases.'[139] Similar fact evidence, as with propensity evidence, inevitably gains its probative strength from the accused's tendency to act in a particular manner.[140] Similar fact reasoning still involves from the accused a 'constancy or uniformity of action and, in that sense, necessarily involves reasoning from propensity.'[141] In both propensity and similar fact evidence, the probative value of the evidence will depend upon the degree of similarity between the

[134] *DPP v Boardman* [1975] AC 421, 452. See also, Palmer, above n 111, 71.
[135] Ibid.
[136] See, eg, Palmer, above n 111, 72; *DPP v PNJ* [2010] VSCA 88, [11]; *DPP v CGL* [2010] VSCA 26, [23], [37].
[137] *R v B(L)* (1997) 116 CCC (3d) 481, 499.
[138] See, eg, Redmayne, above n 121, 664-666; Annalise Acorn, 'Similar Fact Evidence and the Principle of Inductive Reasoning: *Makin* Sense' (1991) 11 *Oxford Journal of Legal Studies* 63, 65; Palmer, above n 111, 54; Carter, above n 132, 34; Hamer, above n 68, 619.
[139] Redmayne, above n 121, 665.
[140] Hamer, above n 107, 157-163.
[141] Acorn, above n 138, 65. See also Hamer, above n 68, 619; Palmer, above n 111, 54; Carter, above n 132, 34.

proposed evidence and the charged offence(s).[142] The greater the degree of similarity, the more likely the proposed evidence will have sufficient probative value for it to satisfy the relatively high test of 'strong probative value' under the new Act for its admissibility.[143] Both propensity evidence and similar fact evidence in practice will often, if not in most cases, coincide.[144] As Stratton observes, there is 'no clear dividing line' between similar fact and propensity evidence.[145]

C *The Operation of the new Act on Similar Fact and Propensity Evidence*

The new Act through its reference to evidence adduced as 'circumstantial evidence of a fact in issue' arguably covers both propensity and similar fact evidence. This would be sensible as in practice both types of evidence will overlap and under the new Act (as at common law)[146] will be subject to a similar test of admissibility. Stratton is correct to note that it is unhelpful whether evidence can be more truly categorised as similar fact or propensity evidence.[147] It is an arid debate to resolve whether an item of evidence is propensity or similar fact evidence. Rather, the two principles, as Stratton observes, 'should be regarded as alternative

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[142] See, eg, *DPP v Boardman* [1975] AC 421; *R v Perry* (1982) 150 CLR 580.

[143] See, eg, John Stratton, 'Tendency and Coincidence Evidence' (Paper presented at Public Defenders Criminal Law Conference, Sydney, March 2008), <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_tendencycoincidence>; *DPP v CGL* [2010] VSCA [31]; *R v AE* [2008] NSWCCA 52, [42].

[144] See, eg, Hamer, above n 68, 620; Jeremy Gans and Andrew Palmer, *Uniform Evidence* (Oxford University Press, 2010) 185; Odgers, above n 107, 523, [1.3.7350]; Hamer, above n 107, 159-161. Both *Makin* and *Pfennig*, for example, can be seen as illustrations of both propensity and similar fact reasoning. See Hamer, above n 107, 160-162; Hamer, above n 68, 620-621.

[145] Stratton, above n 143. Stratton cites *R v Ellis* (2003) 58 NSWLR 700 in this context. See also Mark Weinberg, *Jury Simplification Directions Project: A Report to the Jury Directions Advisory Group* (Dept of Justice, 2012) 198, [4.46].

[146] Hamer, above n 75, 353.

[147] Stratton, above n 143.

and overlapping avenues' for admission.[148]

Section 34P(2)(b) requires that both similar fact and propensity evidence must have 'strong probative value' to be admitted, in addition to the requirement under section 34P(2)(a). The Attorney-General noted in his Second Reading Speech that for the evidence to have 'strong probative value' it must, having regard to the particular issue(s) in the case, be more than simply material or relevant. He noted that it will depend on the particular facts of each case. The Attorney reiterated that, though a relatively high test, the need for 'strong probative value' under the new Act was not intended to be as demanding as *Pfennig*, which requires the exclusion of any rational inference inconsistent with innocence.[149] By contrast, the new Act sets a lower standard for the admission of such evidence, but 'is not intended to open the door to the routine admission of evidence of discreditable conduct.'[150] In other words, the new Act retains the common law's approach that evidence of discreditable conduct should always be carefully scrutinised before it is admitted.

The authors of the new Act, in incorporating this second requirement in section 34P(2)(b), appear to have drawn on the test stated by Gibbs CJ in *R v Sutton*[151] which requires that propensity or similar fact evidence must both have probative value which not only substantially outweighs its prejudicial effect, but that its probative value must also be strong.[152] One might question, given the new Act (as at common law)[153] accepts that the manner in which bad character evidence gains its probative value is through outweighing its prejudicial effect, whether the additional requirement of 'strong probative value' in the section is likely in practice to add much, if anything. If the probative value of evidence adduced for a propensity

[148] Ibid. See also, Gans and Palmer, above n 144, 185.
[149] Rau, above n 1, 3291.
[150] Ibid 3290.
[151] (1984) 152 CLR 528.
[152] Ibid 533.
[153] See, eg, *DPP v P* [1991] 2 AC 447; *R v Handy* [2002] 2 SCR 908, [54]; Carter, above n 132, 36-37; Law Commission, above n 44, 53-54, [4.7]-[4.10].

or similar fact purpose substantially outweighs its prejudicial effect, it appears likely that it will also have 'strong probative value.'[154]

V UNCHARGED ACTS

As an example of its comprehensive treatment of discreditable conduct (bad character) evidence, the new Act, unlike the *Uniform Evidence Act*, also specifically covers the admission of what is described as 'uncharged acts.'[155] Such acts are embraced within the notion of 'discreditable conduct, whether or not constituting an offence.' This expression refers to previous criminal or discreditable conduct for which the accused has not been charged and encompasses evidence of acts that occurred before or after the offence charged. This type of evidence is referred to by various other labels such as 'res gestae,'[156] 'background,'[157] 'context,'[158] 'narrative',[159] 'relationship',[160] 'motivation'[161] and 'guilty passion.'[162] Put shortly, without this type of evidence, it is simply

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[154] See *R v Sutton* (1984) 152 CLR 528, 559 (Deane J). Judge Millsteed also made this point to the authors.

[155] Rau, above n 1. 3291.

[156] See, eg, *R v O'Leary* (1946) 73 CLR 566; *R v Smith* (2003) (2003) 138 A Crim R 403.

[157] See, eg, *R v Fulcher* [1995] 2 Cr App R 251, 258; *R v Stevens* [1995] Crim LR 549.

[158] See, eg, *R v Nieterink* (1999) 76 SASR 56, 66.

[159] See, eg, Roderick Munday, *Evidence (4th ed)* (Oxford University Press, 2007) 277.

[160] See, eg, *R v Hissey* (1973) SASR 6 SASR 280, 288-289; *R v Garrett* (1988) 50 SASR 392, 401-402; *R v Wilson* (1970) 123 CLR 334; *R v Matthews* (1991) 58 SASR 19.

[161] See, eg, *R v Ball* [1910] AC 47; *R v Plomp* (1963) 110 CLR 234; *R v Leonard* (2006) 67 NSWLR 544, 557.

[162] The now outmoded 48 expression 'guilty passion' was first used in *R v Ball* [1911] AC 47: see Palmer, above n 111, 60. 'Guilty passion' (or 'sexual interest' as it is now more commonly known) is an inherently problematic type of bad character evidence: see *R v HML* (2008) 235 CLR 334, [200] (Hayne J). The issue has long remained unresolved: see *R v Nieterink* (1996) 76 SASR 56, 65-66. Though it has often been treated as a type of relationship evidence, it is argued that in reality 'guilty passion' is a form of direct propensity evidence

impossible for the story to be told. Without the evidence of the prior discreditable conduct, the evidence of the complainant may seem 'unreal and unintelligible.'[163] The prior discreditable acts are 'so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances.'[164] This type of evidence is often used to enable the fact-finder to understand that the incident constituting the alleged offence 'did not, as it were, "come out of the blue."'[165] Doyle CJ in the South Australian decision of *R v Nieterink*[166] explained how evidence of uncharged acts can be used to illustrate the context in which the offence occurred:

> The evidence will also sometimes explain how the victim might have come to submit to the acts subject of the first charge. Without the evidence, it would probably seem incredible to the jury that the victim would have submitted to what would seem an isolated act, and likewise it might seem incredible to the jury that the accused would suddenly have committed the first crime charged. The evidence of uncharged acts may also disclose a series of incidents that make it believable or understandable that the victim might not have complained about the incidents charged until much later in the piece, if at all. They may show a pattern of behaviour under which the accused has achieved the submission of the victim. The evidence may establish a pattern of guilt on the part of the child that could also explain the submission and silence of the child.[167]

Such evidence is typically used in cases of alleged sexual abuse, but, as the Attorney-General made clear, the use of this evidence is not confined to sexual cases.[168] A typical example of the use of evidence of uncharged acts beyond sexual offences is provided by *Gardiner*. In this case Anderson J reasoned that 'the violent and dysfunctional

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and it should therefore be subject to the appropriate test for its admissibility: see Arenson, above n 2, 55, 55-56).

163 *R v Garner* (1968) 81 WN (NSW) 120, 122.

164 *R v Bond* [1906] 2 KB 389, 400.

165 *R v Nieterink* (1999) 76 SASR 56, 65 (Doyle CJ).

166 (1999) 76 SASR 56. The Attorney-General noted that the new Act is based on the view of the law expressed in *Nieterink*, See Rau, above n 1, 3291.

167 (1999) 76 SASR, 56, 65. See also, *R v Etherington* (1982) 32 SASR 230, 235.

168 Rau, above n 1. 3292. See also, Stratton, above n 143.

relationship' between the parties' was an 'important part' of the prosecution's circumstantial case against the accused for the murder of his girlfriend.[169] His Honour, drawing on earlier common law authorities[170] (which still remained relevant under the new Act),[171] stated that without the evidence of the earlier acts, the offence could not be properly understood in its context. Anderson J explained that the evidence was 'classic background relationship evidence' and to exclude it would mean deciding the events surrounding the alleged murder 'in a vacuum'[172] or as observed by Menzies J, 'it would be to allow a set of artificial rules remote from reality and unsupported by reason.'[173]

Context evidence under the new Act was also considered by Judge Rice in *R v Bond*.[174] The accused was charged with sexual offences committed on two children. There was evidence of uncharged acts showing discreditable conduct, namely similar sexual offences as to those charged on the first complainant, C1, and as part of the 'grooming process' the fact that the accused had showed pornography to the same complainant and a type of playing card showing sexual acts. Rice DCJ had 'no doubt' that all this evidence should be admitted under section 34P to explain the context of the alleged offences and 'its probative value substantially outweighs any prejudicial effect, particularly having regard to the fact that this is a trial by Judge alone.'[175] His Honour reasoned:

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169 [2012] SASC 160, [440].

170 See *R v Hissey* (1973) 6 SASR 280, 288-289; *R v Wilson* (1970-71) 123 CLR 334; *R v Matthews* (1991) 58 SASR 19. See also, *R v O'Leary* (1946) 73 CLR 566; *R v Garner* (1968) 81 WN (NSW) 120; *R v Williams* (1987) 84 Cr App R 299; *R v Peake* (1996) 67 SASR 297; *R v Vonarx* [1999] 3 VR 618; *R v Sawoniuk* [2000] 2 Cr App R 220 for other examples of the use of such evidence.

171 [2012] SASC 160, [60], [67].

172 Ibid [69].

173 Ibid [83], quoting *R v Wilson* (1970-1971) 123 CLR 334, 334 (Menzies J).

174 [2012] SADC 125.

175 Ibid [16]. The reference to a judge alone trial is significant. This seems to indicate that evidence of uncharged acts may more often be admitted in judge alone trials, as judges may consider themselves less at risk of being

> The basis for admissibility put forward by the prosecution is significant. Grooming is sometimes used as a prelude to sexual abuse. It is sometimes seen as a first step towards, or a lead-up to, more serious conduct, particularly sexual abuse. Grooming may take any number of forms, from generosity to conduct bordering on criminal conduct, for example, a seemingly accidental or innocent touching of a sexual nature. It is a way of testing the reaction of the potential victim to see whether that person is alarmed, frightened, complains or is perhaps passive and does not react. It is sometimes a way of introducing a sexual dimension into a relationship and then increasing the level of it. Grooming does not always take place, but its absence leaves open the comment or argument that the alleged perpetrator was increasing the risk of discovery without first testing the response of the alleged victim. This is the purpose for which the evidence is admitted. This evidence is also capable of being used impermissibly to show that the accused is more likely to have committed the offences or is the sort of person who would commit the offences. I have not used the evidence for any impermissible purpose. Similarly, with uncharged acts of the same or a similar type to those charged relating to C1, those acts have a probative value that substantially outweighs any prejudicial effect. They are relevant to explain why no early complaint was made; why C1 may not be able to remember all of the details of the charged occasions (because there were a number of them); why the charged occasions did not seem out of the ordinary; why the multiplicity of occasions (charged and uncharged) may increase the fear in C1 that she would not be believed and that disclosure would bring more trouble for her. I have used the evidence for these types of purposes and not any impermissible use.[176]

The vital difference between evidence of 'uncharged acts' as was relevant in both *Gardiner* and *Bond* on the one hand, and similar fact and propensity evidence on the other, is that evidence of uncharged acts is not admitted 'for the purpose of exhibiting a particular predisposition on behalf of the accused and hence it is not directly

encumbered by any potential prejudicial effect of the evidence, hence satisfying the statutory test for admissibility more often.

[176] Ibid [17]-[18]. See also, *R v Cashion* [2012] SADC 132, [72]-[74]; (confirmed on appeal) [2013] SASCFC14, [26]-[28]; *R v Koenig* [2013] SASC 42, [30], [89]-[90], [272]; *R v M* [2013] SADC 55, [50]-[51].

relevant to a fact in issue.'[177] Rather, the uncharged acts are admitted for some other more limited purpose,[178] such as in *Gardiner* to show the relationship between the parties and to provide the necessary context to the alleged offence. Whether such a distinction can be drawn has been doubted,[179] but, as the Attorney-General correctly noted, this type of evidence 'had long been used without major difficultly or objection in criminal cases at common law until relatively recent times.'[180]

Following *Pfennig* there was 'considerable confusion' as to whether the 'no rational inference' test applied to the admissibility of uncharged acts.[181] The High Court in subsequent decisions such as *HML*,[182] *R v Roach*[183] and *R v BBH*[184] has singularly failed to clearly resolve whether at common law the *Pfennig* test applies to evidence of context or uncharged acts.[185] This is an issue of 'great practical importance'[186] as application of the *Pfennig* test should

[177] Geoffrey Flatman and Mirko Bagaric, 'Non-Similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) 75 *Australian Law Journal* 190, 195.

[178] See, eg, Palmer, above n 22, 172-173.

[179] See, eg, *R v HML* (2008) 235 CLR 334, [113]-[116] (Hayne J).

[180] Rau, above n 1, 3291. See also, *R v Williams* (1987) 84 Cr App R 299, 303.

[181] Palmer, above n 111, 64. See also *R v Ellis* [2010] SASCFC 118, [100], where it was noted that it was unclear whether *Nieterink* or *Pfennig* applied after *HML* to evidence of bad character adduced for a non-propensity or similar fact purpose.

[182] See further, Hamer, above n 98, 4; Hamer, above n 75, 351-352.

[183] (2011) 242 CLR 610, 624, [42], [45]. The High Court in this case held that *Pfennig* did *not* apply to context evidence.

[184] (2012) 286 ALR 89, Again no clear view emerges. Hayne J: at [68]; Gummow J agreeing and Heydon J held that the *Pfennig* test applied to uncharged acts: at [110]. Three other members of the court expressed a different view; see Crennan and Kiefel JJ: at [148]; Bell J: at [177]. French CJ expressed no view on this issue on the basis that in the case the prior uncharged act was simply irrelevant.

[185] *HML* (and now *BBH*), does not provide an example of the High Court's finest contribution to the development of the criminal law. See Hamer, above n 98, 1-4, 14; Hamer, above n 75, 351-352, 367; Mark Weinberg, 'The Criminal Law – a Mildly Vituperative Critique' (2011) 35 *Melbourne University Law Review* 1177, 1192, n 75.

[186] Palmer, above n 111, 64.

logically render it 'highly unlikely'[187] that evidence of uncharged acts could be held to have satisfied such a stringent test.[188]

It is therefore welcome that the new Act, as the Attorney made clear, ensures that *Nieterink* continues to represent the approach in South Australia and confirms (as applied in *Gardiner* and *Bond*) that this type of evidence, whatever its precise label, can continue to be admitted.[189] These examples of the operation of the new Act make it clear that evidence of uncharged acts can be highly relevant and probative, depending on the facts of any given case. The new Act, by clarifying and explicitly providing for the admission and use of such evidence, ensures that this clearly relevant evidence can continue to be employed in South Australian criminal proceedings.[190]

The new Act also resolves (or at least attempts to as the section may not be as clear in its intended operation as the Attorney-General indicated in his Second Reading Speech),[191] 'the much vexed

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[187] Ibid.

[188] Ibid 64-65; Hamer, above n 75, 355, n 43; Flatman and Bargaric, above n 177, 196. However, a 'clear majority' of the High Court in *R v HML* (2008) 235 CLR 334 held that evidence of uncharged acts, at least to show relationship, satisfied the *Pfennig* test: see Hamer above n 98, 5-6. This was, as Hamer notes, a 'little surprising' given the stringency of that test: at 5. See also *R v BBH* (2012) 286 ALR 89, [108] (Heydon J), [158] (Crennan and Kiefel JJ).

[189] Rau, above n 1, 3291. This type of evidence was historically used without objection and not subject to the exclusionary rule identified in *Makin*. See also, above n 33.

[190] The new Act makes other welcome changes to clarify the law. It overrules the much criticised decision of the High Court in *R v Hoch* (1988) 165 CLR 292: see, eg, Palmer, above n 111, 80; Williams and Draganich, above n 45, 17. It also confirms that in all criminal cases, not just sexual offences, the issue of collusion, being one of credibility, is a question of fact for the jury and is not a factor in determining admissibility: see *Evidence (Discreditable Conduct) Amendment Act* 2011, s 34S(b); see further Rau, above n 1, 3290. The new Act also deals with the question of severance where an accused wishes to adduce evidence of discreditable conduct against a co-accused: see *Evidence (Discreditable Conduct) Amendment Act* 2011, s 34T. However, the extent to which the Act displaces or changes the common law in this context is unclear at this stage: see, eg, *R v Fisher and Ors (No 1)* [2012] SADC 186, [92].

[191] See *R v C* [2013] SADC 16, [196] (Cuthbertson DCJ).

question of the onus of proof in relation to uncharged acts'[192] and dispels the uncertainty created by such decisions of the High Court as *HML*,[193] *R v BBH*[194] and *R v Roach*[195] and provides that there is no general requirement for acts of discreditable conduct to be independently proved beyond reasonable doubt before the jury can rely on them in their deliberations.[196] The Act provides that such acts, consistent with the previous general rule for circumstantial evidence stated by the High Court in *R v Shepherd*[197] only need be proved beyond reasonable doubt if it 'is essential to the process of reasoning leading to a finding of guilt.'[198]

VI CAN BAD CHARACTER EVIDENCE BE ADDUCED WITHOUT UNFAIRLY PREJUDICING THE JURY?

As discussed above, the prejudicial effect of bad character evidence has been viewed as potentially being so strong as to warrant the prohibition of its use. Many mock jury studies support the idea that bad character evidence is unduly prejudicial.

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192 Ibid [195]).

193 In *HML* a clear majority of the High Court appeared to contemplate that uncharged acts had to be independently proved beyond reasonable doubt. See Hamer, above n 98, 9.

194 The High Court in *BBH* similarly appears to have contemplated that uncharged acts had to be independently proved beyond reasonable doubt.

195 (2011) 242 CLR 610, [49]. The majority of the High Court, to add to the confusion in this area, stated that the uncharged acts of domestic violence in that case held to be properly admissible as part of the relationship did not have to be independently proved beyond reasonable doubt.

196 See Hamer, above n 98, 9-13.

197 (1990) 170 CLR 573.

198 See *Evidence (Discreditable Conduct) Amendment Act* 2011, s 34R(2). See also, Rau, above n 1, 3293; *R v C* [2013] SADC 16, [36], [195]-[202]).

A *The Mock Jury Studies*

Critics often refer to the various psychological studies that have been conducted on mock jurors over the past 30 years to support their objection to any reform that involves the greater use of bad character evidence. Greene and Dodge,[199] Wissler and Saks,[200] Munday,[201] Pickel,[202] Kui,[203] Liebman[204] and Lloyd-Bostock[205] all argue that bad character evidence has a disproportionately prejudicial effect on the jury and has the effect of inciting them to convict without properly considering the weight of other factual evidence in detail.[206] A major concern raised by these authors is the notion that jurors may be more inclined to find an accused guilty if aware of their previous wrongdoing simply because they feel that a person who has committed a crime in the past is a person who is generally deserving of punishment.[207]

There have been numerous empirical studies undertaken that examine how mock jurors handle evidence of bad character. Allen and Laudan[208] explain the methodology:

> Most adopt variants of the following design: mock jurors are split into two groups; group (a) is given details of a criminal case – real or imaginary – and asked for a verdict (sometimes involving inter-juror deliberation and sometimes not); group (b) is given the same information but also told that the defendant has a record of prior crimes

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199 Greene and Dodge, above n 36.
200 Wissler and Saks, above n 36.
201 Munday, above n 36.
202 Kerry Pickel, 'Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help' (1995) 19 *Law and Human Behaviour* 407.
203 Cindy Kui, 'Right to an Impartial Jury' (2006) 33 *Syracuse Journal of International Law and Commerce* 495.
204 James Liebman, 'Proposed Evidence Rules 413 to 415 - Some Problems and Recommendations' (1995) 20 *University of Dayton Law Review* 753.
205 Lloyd-Bostock, above n 36.
206 See also, Australian Law Reform Commission, above n 63, [3.13]-[3.14].
207 See Tandy, above n 26.
208 Ronald Allen and Larry Laudan, 'The Devastating Impact of Prior Crimes Evidence – And Other Myths of the Criminal Justice Process' (2011) 101 *Journal of Criminal Law and Criminology* 101.

> and … instructed to ignore the information about prior crimes; finally, conviction and acquittal rates for the two groups are compared.[209]

Doob and Kirshenbaum found that group (b), who knew of the prior record (the informed group), were more likely to convict than group (a), who did not know of the prior record (the uninformed group).[210] Sealy and Cornish found that evidence of prior crimes played a role in cases involving minor crimes but not in more serious cases such as rape and homicide.[211] Hans and Doob found that 40 percent of jurors in the informed group voted to convict while none of the jurors in the uninformed group voted to convict.[212] Wissler and Saks found that the informed group convicted 75 percent of the time when the prior crime convictions were similar to the current case, 52.5 percent of the time when the priors were dissimilar and that mock jurors with no knowledge of the priors convicted only 42.5 percent of the time.[213] Greene and Dodge found that the informed group convicted 40 percent of the time while the uninformed group convicted only 17 percent of the time.[214] Lloyd-Bostock found that the informed group had a 66 percent rate of conviction while the uninformed group voted to convict 52 percent of the time.[215] These studies suggest that juries do tend to give weight to bad character evidence when determining their verdict.

However, we cannot conclude, on the basis of the findings of these studies, that juries are unfairly prejudiced by bad character evidence. Such studies are open to criticism. Though Lloyd-Bostock suggests that her results 'clearly confirm that evidence of previous

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209 Ibid 108.

210 Anthony Doob and Hershi Kirschenbaum, 'Some Empirical Evidence of the Effect of S.12 of the Canada *Evidence Act* upon an Accused' (1973) 15 *Criminal Law Quarterly* 88.

211 A Philip Sealy and William Cornish, 'Juries and the Rules of Evidence' (1973) *Criminal Law Review* 208.

212 Valerie Hans and Anthony Doob, 'Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries' (1976) 18 *Criminal Law Quarterly* 235.

213 Wissler and Saks, above n 36.

214 Greene and Dodge, above n 36.

215 Lloyd-Bostock, above n 37, 753.

convictions can have a prejudicial effect,'[216] Hamer draws attention to the fact that this conclusion appears unsupported by her results. According to Hamer, '[a]ll she established is that mock jurors gave some weight to evidence of a prior conviction.'[217]

There was an obvious limitation on the study undertaken by Wissler and Saks, namely their sample groups. Their study involved interviews with people approached at 'laundromats, supermarkets, airports, bus terminals and private homes in the metropolitan Boston area.'[218] The reliability of the responses taken from people approached on the street and asked to respond immediately to a two-page case summary[219] is questionable. It is well known that jurors tend to take their role and responsibility as finders of fact very seriously.[220] It therefore seems very unlikely that a person approached while waiting for a bus would have had either the opportunity or motivation to enter into any serious consideration of any of the issues addressed by the study. Therefore, the conclusions drawn from these studies may not represent the reality of the approach that real jurors take when considering bad character evidence within the scope of the evidence as a whole. Further the types of scenarios generally used in the studies have been criticised due to the limitations of the scenarios themselves – '[i]f one selects or designs cases that are on, or close to, the margin between guilt proved and guilt not proved, then almost any sort of additional inculpatory evidence could be sufficient to change many jurors' votes from acquit to convict.'[221]

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[216] Ibid.

[217] Hamer, above n 21, 7. See also, Redmayne who questions Lloyd-Bostock's conclusions: Redmayne, above n 43, 699-700.

[218] Wissler and Saks, above n 36, 39-40. Many other similar studies are open to criticism as relying too heavily on university students to comprise the mock jurors. See Richard Wiener, Daniel Krauss and Joel Lieberman, 'Mock Jury Research: Where do we go from Here? (2011) 29 *Behavioral Sciences and the Law* 467, 470.

[219] Wissler and Saks, above n 36, 40.

[220] Peter McClellan, 'Looking inside the Jury Room' (2011) 10 *The Judicial Review* 315, 318. See also Queensland Law Reform Commission, above n 11, 32, [3.23]-[3.24], 76-77, [5.4].

[221] Allen and Laudan, above n 208, 110.

One fundamental limitation is unavoidable – 'no matter how realistic a simulation is, it is still just a simulation.'[222] This criticism is particularly valid in the context of mock jury studies that involve evidence that is *prima facie* highly prejudicial such as bad character evidence. This is because mock jurors reach a verdict in a make-believe case where the defendant exists solely for the purpose of the experiment; whereas real jurors make decisions about real life defendants that could result in a lengthy term of imprisonment. Mock jurors volunteer to participate in short experiments, for which they are sometimes paid or receive university credit. Real jurors are summoned to participate in a trial which might last for weeks, and for which they receive minimal compensation.[223] It can be strongly argued that mock jurors will always be much more flippant toward prejudicial evidence, to the point that a mock juror is much more likely than a real juror in a real trial to allow the prejudicial evidence to affect their verdict. In comparison, a real life juror will be more likely to spend much time considering the evidence in the context of the trial directions and the case as a whole.[224]

This supposition is supported by the anecdotal evidence presented by Warner, Davis and Underwood,[225] when reporting on the results of the Tasmanian Jury Study, which interviewed jurors from real trials.[226] Jurors reported being torn apart 'physically and mentally'[227] because of the pressure of 'dealing with somebody's life … that's a

[222] Brian Bernstein and Sean McCabe, 'Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research' (2005) 32 *Florida State University Law Review* 443, 445.

[223] Ibid.

[224] Tim Preston and Anthony Allan, both highly experienced trial lawyers, noted to the authors that the notion that a mock jury study can accurately and reliably recreate the dynamics and solemnity of an actual trial is difficult, if not impossible. See also, Borstein and McCabe, above n 222, 443-468.

[225] Kate Warner, Julia Davis and Peter Underwood QC, 'The Jury Experience: Insights from the Tasmanian Jury Study' (2011) 10 *The Judicial Review* 333.

[226] Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, *Jury Sentencing Survey* (Report to the Criminological Research Council, April 2010).

[227] Warner, Davis and Underwood, above n 225, 356.

big onerous task.'[228] Because mock jurors will never be in the position where their decision has any real impact on the life of another, their application of the law as presented to them in the simulated trial will be unlikely to be representative of a verdict that a real jury would come to in a real trial.[229] Similar concerns about the value of studies involving 'mock juries' have been expressed elsewhere.[230] These limitations cast doubt on the usefulness and reliability of such studies. The results from mock juries in this context are 'at best food for thought.'[231]

B *The Statistics*

The criticisms of mock jury studies in the context of the examination of bad character evidence can be supported by studies that examine the outcomes of real trials. The National Council of State Courts in the United States (NCSC) and the British Ministry of Justice have both undertaken recent studies into the outcomes of real life jury verdicts, and neither found the level of juror prejudice that has been suggested by the simulation studies. The NCSC found that the acquittal rate for those defendants whose prior crimes were not admitted as evidence to the jury was 23.9 percent, while the acquittal rate for those defendants with prior crimes, whose prior crimes were admitted as evidence to jurors, was 20.3 percent.[232]

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[228] Ibid.

[229] New South Wales Law Reform Commission, *Jury Directions (Consultation Paper 4*) (NSWLRC, 2008) 24-25.

[230] See, eg, Queensland Law Reform Commission, above n 11, 78; Kathleen Gerbasi et al, 'Justice needs a need new Blindfold: a Review of Mock Jury Research' (1977) 84 *Psychology Bulletin* 323; Michael Saks, 'What do Jury Experiments tell us about how Jurors (Should) make Decisions' (1997) 6 *Southern California Interdisciplinary Law Journal* 1, 7; Christy Visher, 'Juror Decision Making: the Importance of Evidence' (1987) 11 *Law and Human Behaviour* 1, 5, n 2.

[231] Jill Hunter, Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Procedure (7th ed)* (LexisNexis, 2005) 1310, [25.12].

[232] Daniel Givelber, 'Lost Innocence' (2005) 42 *American Criminal Law Review* 1167, 1190, cited in Allen and Laudan, above n 208, 105.

This demonstrates that juries who are aware of a defendant's bad character will still acquit in about two cases out of ten – little more than the acquittal rate of those who have not had any character evidence admitted against them. This means that the conviction rate for cases where no evidence of bad character is admitted is only slightly lower than the conviction rate of those whose bad character is used as evidence.

These results are consistent with a similar study undertaken in England in 2009.[233] The study found that when evidence of the accused's bad character was admitted, in 50 percent of Crown Court cases, the outcome was not guilty[234] (which is actually higher than the normal rate of Crown Court acquittals at trial of about 35 percent).[235] This strongly indicates that fears of irredeemable jury bias against defendants with prior convictions are unfounded.[236] Bornstein and McCabe conclude:

> ...the strenuous efforts of legal experts and defence attorneys to restrict the admissibility of prior crimes evidence seem misplaced … Under such circumstances, railing against the admissibility of prior crimes on the grounds that they unfairly disadvantage defendants with criminal records is unnecessary hyperbole.[237]

This reasoning is supported by Culberg, who suggests that the idea

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[233] Office for Criminal Justice Reform,, *Research into the Impact of Bad Character Provisions on the Courts, (Ministry of Justice Research Series 5/09)* (Ministry of Justice, 2009).

[234] Ibid 33.

[235] A recent extensive study found that the overall conviction rate of cases that went to trial at the Crown Court was 65 percent. See Cheryl Thomas, *Are Juries Fair? (Ministry of Justice Research Series 1/10)* (Ministry of Justice (UK), 2010) iv.

[236] This is supported by the view of an English Crown Court Judge who noted that the *Criminal Justice Act 2003* (Eng) which relaxed the English law in favour of the introduction of bad character in criminal cases had not, despite initial fears to the contrary, led to any increase in the number of convictions or guilty pleas. See Interview with His Honour Judge Paget, Central Criminal Court, London, 29 May 2008, quoted by Culberg, above n 26, n 62.

[237] Allen and Laudan, above n 208, 106.

that jurors will overvalue evidence of bad character is 'internally inconsistent.'[238] He argues:

> Juries are the backbone of … [the] criminal justice system, trusted as authoritative finders of fact. If we are to trust that their 'consensus of opinion is a valid proxy for accuracy,' then we must accept that if a jury gives propensity character evidence great weight in one case, then it necessarily is deserving of that weight.[239]

Culberg further argues that there is no reason to believe that a jury would 'conspire to act so nefariously as to base their verdict on uncharged conduct.'[240] Melilli supports this conclusion, stating the 'notion that it is unfair to punish someone for something other than the matter at issue is so straightforward ... that it is difficult to fathom that an entire jury would agree to do just that.'[241]

The real life studies refute the idea that the amount of weight given to bad character evidence by juries leads to disproportionately high numbers of guilty verdicts. Bagaric and Amarasekara contend that the notion that a jury may be unduly prejudiced by the use of bad character 'rests upon unproved assumptions.'[242] They conclude:

> To assume that similar fact evidence must inevitably prejudice the jury not only accords insufficient weight to the collective intelligence of such a body, but also discounts entirely the effect of defence counsel's cross-examination as well as the trial judge's caution.[243]

Ultimately, as Melilli asserts, there is neither empirical data nor any sound reason to conclude that juries overvalue character evidence.[244] The supposition that 'we as lawyers nevertheless know how all – or

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[238] Culberg, above n 26, 1352.
[239] Ibid, quoting Kenneth Melilli, 'The Character Evidence Rule Revisited' (1998) *Brigham Young University Law Review* 1547.
[240] Culberg, above n 26, 1352.
[241] Melilli, above n 239, 1607.
[242] Bagaric and Amarasekara, above n 13, 95.
[243] Ibid.
[244] Melilli, above n 239, 1607, 1608.

at least most – jurors perceive character evidence, and further that we as lawyers have the singularly correct view of such evidence, is not only baseless, it is also arrogant.'[245] Thus, as Melilli observes, the search for a viable justification for the bad character evidence rule continues.[246]

In summary, research shows that past conduct is regarded as relevant evidence and that the disclosure of a record of prior bad acts, particularly similar previous bad acts, can increase the likelihood that a jury will find the accused guilty. But the vital point made by the recent research into real, as opposed to mock, jurors is that 'there is no evidence to suggest that the amount of weight accorded to past conduct is disproportionate to its logical relevance.'[247]

The first premise underlying the new Act that evidence of bad character can be introduced in criminal proceedings in wider circumstances than contemplated by the strict common law approach based on *Pfennig* and *HML* is sound. Indeed, noting the research and experience in England and elsewhere it can be argued that the relatively cautious approach adopted in the new Act to the use of bad character evidence is too limited. The jury, despite the traditional fears to the contrary, can be entrusted with a wider range of such evidence and unfair or undue prejudice will not necessarily result.

In *R v A (No 2)*[248] Lord Hope of Craighead observed that 'a law which prevents the trier of fact from getting at the truth by excluding relevant evidence runs counter to our fundamental conceptions of justice and what constitutes a fair trial.'[249] In *R v Seaboyer*,[250] a

[245] Ibid.
[246] Ibid.
[247] Bagaric and Amarasekara, above n 13, 82. See also, William Young, 'Summing up to Juries in Criminal Cases' [2003] *Criminal Law Review* 665, 681.
[248] [2002] 1 AC 45.
[249] Ibid [55].

Canadian case, McLachlin J, delivering the judgment on behalf of the majority of the Supreme Court of Canada, observed that it is fundamental to a fair system of criminal justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues in a case. [251] The approach of the High Court in cases such as *Pfennig* and *HML* is at odds with common sense and sets an unrealistic and unduly high standard for the admissibility and use of evidence of evidence of bad character.

VII ARE JURORS CAPABLE OF FOLLOWING A JUDGE'S DIRECTION ON THE PROPER USE OF BAD CHARACTER EVIDENCE?

The new Act new assumes, rightly in the authors' view, that bad character propensity evidence can be admitted in wider circumstances than the present Australian common law as declared by the High Court in cases such as *Pfennig* and *HML* allows, without the jury being affected by an inescapable or unfair bias against the defendant. This leads to a consideration of the second assumption behind the new Act; that juries can hear evidence of bad character and then use it for the purpose for which it is intended, as directed by the trial judge, rather than for an impermissible purpose.

An impermissible purpose would include reasoning that because the defendant has committed a crime before, that they must have done it again.[252] Impermissible purpose reasoning also arises in cases that involve the admission of evidence of uncharged acts, where that evidence must not be used for propensity purposes, but is to be used rather for the purpose of establishing the relationship between the accused and complainant or the background or context

[250] [1991] 2 SCR 577. See also *Evidence (Discreditable Conduct) Amendment Act* 2011, s 34R.
[251] [1991] 2 SCR 577, 609.
[252] Rau, above n 1, 3290. This reflects the first principle from *Makin*.

of the offending.[253] In these circumstances, the new Act, drawing on established common law practice,[254] requires that the jury must be directed that they must not find that the accused has committed the act charged because they have committed another wrongful act.[255] Furthermore, the jury must be directed that where bad character evidence is adduced for a particular purpose, such as explaining the relationship between the accused and another party or to put the alleged offence in its context, the use of that evidence is limited to that purpose and it cannot be employed for wider purposes, such as propensity purposes.[256] A judge must therefore give very specific directions to explain exactly how the bad character evidence may be used.[257]

A *Research suggesting that jurors are unable to follow directions correctly*

There is relatively little empirical research which looks at the extent to which real jurors, as opposed to mock jurors, understand directions on the law delivered by the judge at the end of the trial.[258]

However, there is a widespread view that jurors are simply unable to understand and apply directions as to the limited use of

[253] See Rau, above n 1, 3291-3292. See also, *R v Nieterink* (1999) 76 SASR 56, 72-74

[254] See, eg, *R v Beserick* (1993) 390 NSWLR 510, 516; *R v Kemp* [1997] 1 Qd R 383, 398; *R v Nieterink* (1999) 76 SASR 56, 72-74; *R v Qualtieri* (2006) 171 A Crim R 463, [80].

[255] [1991] 2 SCR 577. *Evidence (Discreditable Conduct) (Amendment) Act* 2011 s 34P.

[256] Ibid s 34Q. See also Odgers, above n 107, 528-531, [1.3.7400].

[257] An example of such a direction can be found from Judicial Commission of NSW, *Tendency and Coincidence Evidence* (June 2011) Criminal Trial Courts Bench Book, <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/tendency_and_coincidence_evidence.html>.

[258] See, eg, Thomas, above n 235, 35; ALRC (2006), above n 61, [18.9], [18.16]. Justice Eames notes that 'in the absence of such research, it is a field in which anecdote, self-assurance and self-delusion abound within the ranks of the legal profession and judiciary:' Geoffrey Eames, 'Towards a Better Direction – Better Communication with Jurors' (2003) 24 *Australian Bar Review* 36, 39.

evidence.[259] Justice Weinberg as part of the recent Jury Simplification Directions Project referred to the 'vast research showing that limited directions are either ineffectual or counter-productive.'[260] Kirby J in *R v Zoneff*,[261] expressed similar views:

> The law presumes that triers of fact are able to disregard the prejudicial aspects of testimony and adjust appropriately the weight to be attached to such evidence on the basis of its 'probative value.' However, such empirical studies as have been performed on jurors' abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way. Indeed, there is some empirical evidence which suggests that instructions about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury's mind the significance of the issue, precisely because of the judge's attention to it.[262]

The question of whether such fears are justified is not simple to answer. Justice Young has observed that it is unclear from current research whether jurors can understand and apply limited use directions and avoid propensity reasoning.[263] Thomas undertook a large scale study featuring actual jurors from criminal trials, albeit in

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[259] See, eg, Joel Lieberman and Jamie Arndt, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology, Public Policy and Law* 677-711; Queensland Law Reform Commission, *A Review of Jury Directions (Issues Paper 66)*), 138, [6.43]-[6.44]; J Alexander Tanford, The Law and Psychology of Jury Instruction' (2000) 69 *Nebraska Law Review* 71, 87, 97-99; Sharon Wolf and David Montgomery, 'Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Effects on Mock Jurors (1977) 7 *Journal of Applied Social Psychology* 291-309.

[260] Weinberg, above n 145, 262, [4.211].

[261] (2000) 200 CLR 234.

[262] Ibid 261. This is at odds with Kirby J's views as Acting Chief Justice in *R v Yuill* (1993) 69 A Crim R 450, 453-4 in the context of a jury's ability to act on judicial directions and discount adverse press coverage.

[263] Young, above n 247, 681.

simulation studies, for the British Ministry of Justice.[264] The study was designed to assess whether juries can understand judicial directions.[265] The participants were asked to evaluate their understanding of the directions given in the simulated trials. The results were wide-ranging, with between 51 percent and 69 percent of jurors believing that they were able to understand the judge's directions.[266] Thomas reported that there were no differences in juror 'gender, age, employment or profession in these three different groups of jurors that might account for these differences.'[267]

To explore juror comprehension in more detail, Thomas asked a portion of the jurors to identify the two questions that the judge had explicitly directed them to answer. The case involved a charge of assault, with the possibility of the defence of self-defence. To determine if the defendant had acted in self-defence the questions that needed to be answered were 'did the defendant believe it was necessary to defend himself and did he use reasonable force?'[268] Asking the jurors to identify these questions following the simulated trial provided an 'objective measure of how well jurors actually understood the directions on the law.'[269] Thomas found that '31 percent of jurors accurately identified both questions. A further 48 percent correctly identified one of the two questions, and 20 percent did not correctly identify either question.'[270] This revealed that in this study, only a minority fully understood the directions given by the judge.[271]

Thomas points out, however, that among jurors who did not correctly identify both legal questions, 'the question chosen most often (17 percent) was "did the victim push the defendant first before

[264] Thomas, above n 235.
[265] Ibid 36.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.
[270] Ibid.
[271] Ibid 37.

he was punched?"'[272] Because this question is in essence the same as the legal question, which was whether the defendant believed it was necessary to defend himself, Thomas concluded that the jury is not incapable of understanding issues presented to them; rather it appeared that they simply 'did not necessarily see the issues in the legal terms presented to them in the judge's directions.'[273] Crucially, this did not prevent the jurors from applying the law correctly.

This study was, however, conducted only in relation to fairly straightforward jury directions. Directions about the use of bad character evidence are undoubtedly more complex. The Queensland Law Reform Commission has highlighted problems with propensity directions, commenting that they have been 'been noted as particularly problematic examples of limited-use directions and their efficacy in neutralising the prejudicial effect of such evidence has been doubted.'[274] This is because, in requiring the jury to restrict their use of the evidence, for example to consider it only in order to contextualise the offence, the direction requires the jury to disregard it for other purposes. The Commission noted that the underlying issue of limited use directions on bad character evidence is the fact that 'they require a mental compartmentalisation of the evidence that may seem both counter-intuitive and intellectually difficult, if not impossible.'[275] The Queensland Law Reform Commission observed:

> An especially 'artificial and incomprehensible' distinction is also sometimes drawn between permissible ('specific') and impermissible ('general' or 'mere') propensity reasoning—for example, where the jury may reason that, because the accused committed similar acts in the past, perhaps with the same distinctive *modus operandi* or such as to show a sexual interest in the complainant, it is likely that he or she is the person who committed the offence charged—but may not reason that, just because the accused has committed other offences, he or she is a bad person and therefore the kind of person who is likely to be guilty. Such

[272] Ibid.
[273] Ibid.
[274] Queensland Law Reform Commission, above n 11, 430, [13.31]. This accord with other views, see especially the sources quoted by Victorian Law Reform Commission, above n 14, 63, n 236.
[275] Queensland Law Reform Commission, above n 11, 430.

directions have, understandably, been criticised as 'contradictory.'[276]

Zuckerman takes a similar view, arguing that limited use propensity evidence directions 'do no more than create a conflict between the legal standards according to which propensity evidence may be admitted and the "normal standards" familiar to the jury.'[277] This is because Zuckerman believes that 'juries are unlikely to defer to a legal standard which they do not understand in preference to a moral one which they do.'[278] The New Zealand Law Reform Commission also asserts that 'it would be unwise to assume juries can and will always, or even usually, implement judicial directions[279] which require jurors to 'set aside inflamed feelings against a defendant guilty of repugnant previous misconduct'[280] or require jurors to 'use evidence only for limited purposes when the evidence appears naturally and sensibly relevant to wider purposes.'[281] Melilli argues, 'because such instructions are often both hopelessly confusing and contrary to common sense, there is no realistic hope that they will be followed by jurors.'[282]

B *Research suggesting that jurors are capable of following directions*

A limited number of studies have supported the idea that both actual and mock jurors can apply judicial directions properly. An English study in 1990 found that the jurors were able to understand and apply judicial directions to use bad character evidence for limited purposes and, if anything, overcompensated to avoid prejudicial

[276] Ibid, quoting James Wood, 'Jury Directions' (2007) 16 *Journal of Judicial Administration* 151, 155.
[277] Adrian Zuckerman, 'Similar Fact Evidence – The Unobservable Rule' (1987) 104 *Law Quarterly Review* 187, 209.
[278] Ibid.
[279] New Zealand Law Commission, above n 10, 112.
[280] Ibid.
[281] Ibid.
[282] Melilli, above n 239, 1549.

reasoning.[283] Mock jury studies such as the work of Borgida and Park[284] and Tanford and Cox[285] have found that jurors are able to follow limiting instructions to use prior conviction evidence as bearing only on the defendant's truthfulness, rather than their propensity to commit crimes. Furthermore, the New Zealand Law Commission found in the study it undertook in 1998 that jurors 'endeavoured to understand the law and to apply it to the facts as fairly and as impartially as they could, often methodically working through the elements of the law on the basis of the judge's instructions in order to do so.'[286] The Commission found that there was little evidence that juries 'were concerned to temper the rigidities of the law by applying their own "common sense" or by bringing to bear their own brand of justice.'[287] Rather, the Commission reasoned jurors 'generally endeavoured to follow the judge's instructions, even when this led them to a verdict which was against their "gut feeling."'[288]

The notion that jurors can apply directions even if they are counterintuitive is supported by other studies. Bagaric and Amarasekara, for example, assert that when analysing the value of the jury as a whole, and without reference to the particular issue of the application of directions, the available evidence suggests that the jury is an accurate fact-finding body and is generally reliable in its assessment of behaviour as a whole.[289] This is because 'the jury approaches its task with the benefit of a diverse range of

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[283] Evelyn Schaefer and Kristine Hansen, 'Similar Fact Evidence and Limited Use Instructions: An Empirical Investigation' (1990) 14 *Criminal Law Journal* 157.

[284] Eugene Borgida and Roger Park, 'The Entrapment Defence: Juror Comprehension and Decision Making' (1988) 12 *Law and Human Behaviour* 19.

[285] Sarah Tanford and Michele Cox, 'The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making' (1988) 12 *Law and Human Behaviour* 477.

[286] New Zealand Law Commission, *Juries in Criminal Trials: Part 2: A Summary of the Research Findings (Preliminary Paper 37)* (NZLC, 1999) Vol 2, 53.

[287] Ibid.

[288] Ibid.

[289] Amarasekara and Bagaric, above n 13, 81.

backgrounds and experience, far broader than those of a judge.'[290] Furthermore, 'the jury's deliberative process contributes to more accurate fact finding, because each detail is examined and subjected to conscious scrutiny by the group.'[291] Bagaric and Amarasekara base this argument on the results of a study undertaken in New Zealand by Young, Tinsley and Cameron, who analysed the decision-making processes of 48 juries.[292] Their study revealed that in 19 of the 48 trials, 'individual jurors overtly raised arguments based upon sympathy or prejudice during deliberations.'[293] However, this was found to have rarely played a significant role in the jury's ultimate decision because the arguments were 'routinely overridden by the remainder of the jury.'[294] The authors noted that there were there were only six cases in 'which feelings of sympathy or prejudice were identified as having affected the outcome of the trial in some way.' It was noted that three of the cases resulted in a hung jury; one in a questionable verdict; and two in a verdict which was justifiable but reached by dubious reasoning.[295]

This suggests that in the case of real life jurors, the serious nature of the deliberation process leads to more effective consideration and application of judicial directions than can be demonstrated in any simulation study. This argument can be further supported by the Arizona Jury Project, an extensive study undertaken in the United States that involved real life juries, and included the videotaping of many jury deliberations. Diamond, Murphy and Rose used these videotapes to look specifically at the jury's ability to apply the

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290 Ibid.

291 Ibid.

292 Warren Young, Yvette Tinsley and Neil Cameron, 'The Effectiveness and Efficiency of Jury Decision -Making' (2000) 24 *Criminal Law Journal* 89. See also Yvette Tinsley, 'Jury Decision Making: a Look inside the Jury Room', (The British Criminology Conference: Selected Proceedings, Volume 4, Papers from the British Society of Criminology Conference, Leicester, July 2000), <http://www.britsoccrim.org/volume4/004.pdf>.

293 Young, Tinsley and Cameron, above n 292, 97.

294 Ibid.

295 Ibid.

judge's directions in a civil context.[296] Despite the fact that this study did not focus on criminal trials, its results, nevertheless, shed light into the way that juries respond to a trial judge's directions. Diamond, Murphy and Rose found that their study did not support the 'standard story' that jury directions were 'little more than window dressing – either the jurors simply ignore the instructions or they are hopelessly confused.'[297] They concluded that the 'conventional wisdom' on jury comprehension of legal instructions was at best only partially correct and, although there were some significant exceptions, 'the deliberations of the Arizona juries as they discussed legal issues were remarkably consistent with the instructions they received.'[298] Diamond, Murphy and Rose, highlighted the fact that nearly all studies that had compared jury verdicts with the verdicts that judges reported they would have reached in the same trial, had found very substantial agreement between the two decision makers.[299] Diamond, Murphy and Rose concluded:

> This agreement certainly could arise not because jurors understand the legal instructions, but because they share values consistent with the content of those instructions. Whatever the source of the agreement, it does provide an indication that problems in communicating legal principles may not pose a significant threat to the quality of most jury decision making.[300]

Directions relating to the use of evidence for a limited purpose pose particular problems. Even Spencer, who is a strong advocate for the use of bad character evidence, recognises that directions given on

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[296] Shari Diamond, Beth Murphy and Mary Rose, 'The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures and Next Steps' (2012) 106 *Northwestern University Law Review* 1537.

[297] Ibid 1538.

[298] Ibid 1605.

[299] Ibid 1543. See also, similarly, the references cited at 1543, n 24; Sarah McCabe and Robert Purves, *The Jury at Work* (Basil Blackwell, 1972); Martin Zander and Paul Henderson, (1993) *Crown Court Study (RCCJ Study 19)* (HMSO, 1993) Table 6.7 and the extensive overview conducted by Jennifer Robbennolt, 'Evaluating Juries by Comparison to Judges: a Benchmark for Judging?'(2005) 32 *Florida State University Law Review* 469, 476-483, 509.

[300] Diamond, Murphy and Rose, above n 296, 1543.

this sort of evidence can have negative outcomes:

> Directions to juries that evidence which is logically relevant to issue A may only be considered in relation to issue B, to which it is less relevant to than issue A, are certain to be confusing and unlikely in practice to be followed. 35 years ago they were famously castigated by Sir Rupert Cross as 'gibberish' and they have not become any more comprehensible in the interval. Furthermore, to believe that a direction of this sort is both necessary and desirable presupposes a mind-set about the qualities and abilities of juries that is schizophrenic … In reality, the practical effect of requiring judges to deliver directions of this kind is to sow the seeds of unmeritorious appeals in cases where they understandably forget to give them, without advancing the overriding objective of criminal justice, which is the acquittal of the innocent and the conviction of the guilty.[301]

C *Improving jury directions*

Despite the concerns about a jury's ability to properly apply a judge's directions, the fact remains that bad character evidence is often highly probative in ways other than propensity, and its other use may well be appropriate. The Queensland Law Reform Commission concluded that the 'blanket exclusion of all propensity evidence … [is] a clearly unsatisfactory approach given that it would exclude much relevant and probative evidence.'[302]

Overall, it is clear that while concerns over the jury's ability to correctly follow a judge's directions on more complex legal matters are valid, this is not fatal to the assumption that juries can apply directions to use bad character evidence for a limited purpose only. Though an extended scrutiny of the operation and comprehension of juries is beyond the scope of this article, recent research has made it clear that juries are competent and capable of applying directions where the directions are given in a form that they understand.[303] The

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[301] Spencer, above n 45, 119-120.

[302] Queensland Law Reform Commission, above n 11, 441, [13.67].

[303] See, eg, Penny Darbyshire, 'What Can we learn from Published Jury Research: Findings for the Criminal Courts Review' [2001] *Criminal Law Review* 677, 703; Tanford, above n 259, 79; Bethany Dumas, 'Jury Trials: Lay Jurors,

use of straightforward explanations and plain English (especially as to legal concepts),[304] written directions[305] and the use of integrated directions and 'question trails' specific to the facts of the case[306] have proved to be particularly useful in this context. Providing jurors with clear and comprehensible instructions, including written directions where appropriate, is therefore arguably the most effective way to ensure that jurors are capable of applying complex legal directions. As Diamond, Murphy and Rose argue, 'these reforms are obvious improvements that are long overdue.'[307]

While it seems valid to assert that compartmentalisation of evidence for different purposes is hard for lawyers, let alone untrained jurors to achieve, it seems irrational that simple tasks – such as providing jurors with tailored instructions, which can drastically increase the jury's ability to come to a legally sound verdict – are not already instituted at all jury trials.[308] Furthermore,

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Pattern Jury Instructions and Jury Comprehension' (2000) 67 *Tennessee Law Review* 701, 741-742; Peter Lowe, 'Challenges for the Jury System and a Fair Trial in the 21st Century' [2011] *Journal of Commonwealth Criminal Law* 175, 200-201.

304 See, eg, Chief Justice Marilyn Warren, 'Making it Easier for Juries to be Deciders of Fact', Speech delivered 8 September 2011, AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney; New South Wales Law Reform Commission, *Jury Directions (Report 146)* (NSWLRC, 2012) 48-51, [3.17]-[3.29]; Wood, above n 276, 156; Queensland Law Reform Commission, above n 11, 167-170, [8.25]-[8.35], 407.

305 See, eg, New South Wales Law Reform Commission, above n 304, [6.110]-[6.121], 136-140; Ronald Roesch, Stephen Hart and James Ogloff (eds), *Psychology and Law* (Klewer Academic/Plenum Publishers, 1999) 36; New Zealand Law Commission, *Juries in Criminal Trials (Report 69)* (NZLC, 2001) 121; Thomas, above n 235, 38.

306 See, eg, New South Wales Law Reform Commission, above n 304, [6.140]-[6.170], 144-152; Queensland Law Reform Commission, discussion above n 259, 197-199, [9.97]-[9.105], Queensland Law Reform Commission, above n 11, 287, [9.130]; Victorian Law Reform Commission, above n 14, 118-120, [6.47]-[6.60].

307 Diamond, Murphy and Rose, above n 296, 1544-1545.

308 New Zealand Law Commission, above n 305, 121. The Commission found that providing jurors with a written flowchart demonstrating how to apply the law

one conclusion that can be drawn from the studies which feature real-life jurors is the fact that jurors are 'highly conscientious … [take] the role very seriously, and … [are] extremely concerned to ensure that they … [do] the right thing.'[309] As a result, it is illogical to dismiss the capability and determination of any real-life juror to properly consider and apply judicial directions. With appropriate support and revised and simplified directions, juries can and should be able to understand and apply judicial directions, even complex directions as to the limited use of evidence.[310]

The consistent theme of the many recent studies into the operation of juries, whilst freely acknowledging the problems that modern juries encounter in the effective understanding and application of the relevant law (especially as to limited use directions), are, nevertheless, clear that the solution is not to discard trial by jury but rather to improve the present system and make the jury's task easier.[311] As the New South Wales Law Reform Commission observed as early as 1986:

> Common sense suggests that the jury's task is an onerous one. It is our view that efforts should be made to simplify the task of juries. We

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was particularly helpful in assisting jurors to reach a verdict. See also, Warren, above n 304, 9, 13.

309 Young, Tinsley and Cameron, above n 292, 97. See also, Queensland Law Reform Commission, above n 11, [2.12], [2.21]; Young, above n 247, 671; Diane Bridgeman and David Marlowe, 'Jury Decision Making: an Empirical Study of Actual Felony Trials' (1979) 34 *Journal of Applied Psychology* 91-98.

310 The recent *Jury Directions Act 2012* (Vic) which simplifies a wide range of often complex jury directions gives effect to this premise. See further Victorian Law Reform Commission, above n 14, 7-18; Weinberg, above n 145, [1.47], 14, [4.206]-[4.244], 261-275; Criminal Law Review, *Jury Directions: a New Approach* (Department of Justice, 2012) 4-5, 10-13, 30-35; Robert Clark, the Victorian Attorney-General, Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5556-5561, especially 5561.

311 See, eg, New South Wales Law Reform Commission, above n 304, [1.22]-[1.23], 8; New South Wales Law Reform Commission, above n 229, [10.1]; Queensland Law Reform Commission, above n 11, 2-3, [1.8]-[1.15]; Warren, above n 304; 13; Young, above n 247, 689; Young, Tinsley and Cameron, above n 292, 100. Diamond, Murphy and Rose, above n 296, 1605-1606.

> reject the argument that the difficulties identified lead necessarily to the conclusion that juries should be abandoned ... we recommend the ways in which, at various stages the task of the jury can be made easier ... The easier the task is made, the more effective will be the jury's performance and the more reliable the verdict.[312]

VIII CONCLUSION

While the new Act is not intended to undermine the accused's fundamental right to a fair trial,[313] it must be borne in mind that fairness is not solely confined to the interests of the accused.[314] 'In a criminal case,' as Lord Steyn explained in *Attorney General's Reference (No 3 of 1999),*[315] 'there must be fairness to all sides [and] this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family and the public.'[316]

The no rational inference *Pfennig* test, as this article has argued, is inappropriate and sets the bar for admissibility too high. The current common law test in Australia as stated by the High Court in *Pfennig* and refined in *HML* to arguably extend to all forms of bad character evidence 'demonstrates an irrational prejudice against such evidence and substantially subverts the principal aim of the criminal trial process: to identify and punish those responsible for criminal offences.'[317] It is illogical to withhold such relevant and probative evidence from the jury. Indeed, it has been argued that 'compelling and clear reasons are necessary to justify' withholding bad character

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312 New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial (Report 48)* (NSWLRC, 1986) [6-1].

313 Rau, above n 1, 3294.

314 See, eg, *R v Pfennig* (1995) 182 CLR 461, 507 (Toohey J); Jeremy Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism – Part 1' (1994-1995) 4 *Journal of Judicial Administration* 171, 172.

315 [2001] 2 AC 91.

316 Ibid 118.

317 Bagaric and Amarasekara, above n 13, 98.

evidence from a jury.[318] Where bad character evidence is relevant and otherwise admissible, it should be treated like other forms of evidence and admitted so that it may assist the jury to make a fair and well-informed decision.

The introduction of evidence of bad character does not appear to have the profound effect upon the course and outcome of the criminal trial that it is often claimed to have.[319] The strict common law bad character evidence rule stated in cases such as *Pfennig* and *HML* cannot be justified by any sound policy. It exists because of an unjustified mistrust of the jury.[320] This article argued that the first assumption underlying the new Act is valid and that evidence of bad character can be introduced in the broader circumstances contemplated by the new Act without unfairly prejudicing the accused. Indeed, the new Act is a relatively cautious departure from the strict common law position stated in *Pfennig* and *HML*; it might be contended that bad character evidence could be properly employed in even wider circumstances than contemplated by the Act without unfairly prejudicing the accused and his or her right to a fair trial.

This article has shown that it is right that jurors are influenced by character evidence because such evidence is relevant and probative. While mock jury studies have suggested that the jury overvalues this type of evidence to the extent that the jury is irredeemably biased against the defendant, the value and interpretation of mock jury studies in this context are strictly limited. To draw conclusions regarding the use that juries make of this type of evidence and how it affects them, more value ought to be given to the findings in the real life studies. These have demonstrated that jurors are able to utilise evidence of bad character correctly and without the often claimed irredeemable bias against the defendant. The research quoted in this

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[318] Ibid 95.
[319] Cossins, above n 28, 846-847, 859, 864.
[320] See, eg, Bagaric and Amarasekara, above n 13, 95-98; Melilli, above n 239, 1629.

article and the English experience regarding the use of bad character evidence suggests that the introduction of such evidence does not generally have the devastating effect upon the outcome of the trial as is traditionally feared.

This article has further argued that while there is a risk of unsafe verdicts involved in jury directions which requires the limited use of bad character evidence, this can be minimised if a judge issues clear and comprehensible directions and the jury are given appropriate support. Empirical evidence suggests that the second assumption underlying the Act is correct, and that, with support and further development of judicial directions, there is no undue risk of unsafe verdicts under the new Act. Though doubts are often expressed about a jury's ability to understand and act on such directions, the criminal justice system operates on the basis that the jury will faithfully act on, and follow, such directions.[321] Ultimately, as was declared in *R v Milat*[322] by the New South Wales Court of Appeal, 'It is the capacity of jurors, properly instructed by trial judges to decide cases by reference to legally admissible evidence and legally relevant arguments, and not otherwise, that is the foundation of the [criminal justice] system.'[323] This article argues that in the context of judicial directions as to the correct use of bad character evidence, this confidence appears to be justified if the jury are provided with appropriate support and straightforward warnings and advice.

Whether the new Act will prove 'an elegantly simple solution to this very complex problem,'[324] as the Attorney-General declared, remains to be seen. As the Honourable Ms Vicki Chapman noted during the Parliamentary debate, 'To some degree, the jury is out– pardon the pun–on whether it will produce a workable and

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See, eg, *R v Gilbert* (2000) 201 CLR 414, 425 (McHugh J); ALRC (2006), above n 61, [18.8]; Rau, above n 1, 3292-3293.

322 Unreported, New South Wales Court of Appeal, 26 February 1998, BC9800394.

323 Ibid [47].

324 Rau, above n 15, 4638.

considered model.'[325] It will be crucial to see how the courts, especially the High Court in due course, consider and apply the new Act. Given the myriad of factual and legal scenarios that can arise, there is no legislative silver bullet that will ever entirely resolve this vexed area of the criminal law. As Davis and Dight argue:

> Legislative intervention is always going to be of dubious value in an area of the law such as this. Even if a legislative test could be devised, that test still has to be applied and it is obvious that from time to time cases will be thrown up where the application of any test will be difficult.[326]

Nevertheless, this article argues that the new Act is an important improvement on the previous Australian common law approach. In summary, the new Act is an improvement in the following respects; it abolishes the *Pfennig* test insofar as it applied to propensity and similar fact evidence and replaces it with the strong probative value test in section 34P(2)(b) of the Act; it confirms the approach in *Nieterink* and dispels the suggestions to the contrary in *HML* and makes it clear that the *Pfennig* test does not apply to determine the admissibility of any other sort of discreditable conduct evidence, nor can the possibility of collusion or concoction determine its admissibility; the new Act discards the 'illogical'[327] notion that discreditable acts are subject to a general requirement to be proved beyond reasonable doubt before they can be used by the jury; and it requires notice of evidence of discreditable conduct to ensure it is closely scrutinised before it is admitted. The new Act may not necessarily resolve the 'Schleswig-Holstein question of the criminal law' but it represents a fair and workable model.

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[325] Chapman, above n 12, 4637.

[326] Peter Davis QC and Mark Dight, 'Similar Fact and Relationship Evidence,' <portal.barweb.com.au/upload/FCK/pater.%20Davis%20SC%20-%20lecture.pdf>, 19.

[327] Hamer, above n 98, 14.