

THE BEHAVIOUR OF SERIAL CHILD SEX OFFENDERS: IMPLICATIONS FOR THE PROSECUTION OF CHILD SEX OFFENCES IN JOINT TRIALS

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[This article summarises the literature on child sex offender ('CSO') recidivism and sexual behaviour, in order to consider the implications for the rules used at common law and under the uniform Evidence Acts ('UEAs') for excluding propensity/tendency and coincidence/similar fact evidence in trials involving multiple complainants. By analysing two distinct lines of authority from courts of appeal in New South Wales and Victoria, this article demonstrates that the use of the 'striking similarities' test and similar formulations under the UEA shows a lack of understanding of the wide variety in the behaviour of CSOs who do not demonstrate a propensity for strikingly similar behaviours with different victims. In recommending reforms to the UEA to reflect the reality of CSO sexual behaviour, the article concludes that the striking similarities test and similar formulations should be abandoned when assessing the cross-admissibility of the evidence of multiple complainants in a joint trial involving child sex offences.]

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I INTRODUCTION

Serial and repeat sex offending is a phenomenon that is well documented in the psychological literature.¹ Although the observed recidivism rate for child sex offenders ('CSOs') is considered to be between 10 and 20 per cent after five years,² this is likely to be a substantial underestimation since a majority of children only disclose sexual abuse one or more years after it has occurred, or not at all.³ In fact, '[s]tudies using data from police and child protection files have estimated that actual recidivism rates are more than twice those indicated by reconviction data'.⁴

There are many factors that affect a child's ability to report sexual abuse.⁵ Children are less likely to disclose if they are abused by a relative, while stranger abuse is the single best predictor of rapid disclosure.⁶ Less intrusive forms of abuse may be more likely to be reported, while children who experience multiple abuse and younger children are less likely to disclose.⁷ Under-reporting means that the true recidivism rate for serial offenders may be impossible to estimate, although the rate is likely to be much higher than the estimation of 10–20 per cent.⁸

While the recidivism of CSOs presents key issues in relation to child safety and detection by authorities, it also poses problems for the prosecution of sex offences involving multiple offences and/or multiple complainants — problems that have not been previously discussed in the legal literature.⁹

¹ Unless specified otherwise, all references to offences committed by child sex offenders ('CSOs') refer to sex offending and sex offences. A CSO is a person who commits a sex offence against a child under the age of 18 years. Serial offending is defined as a CSO having two or more victims while repeat offending refers to more than one offence with the same victim.

² See Terance D Miethe, Jodi Olson and Ojmarrh Mitchell, 'Specialization and Persistence in the Arrest Histories of Sex Offenders' (2006) 43 *Journal of Research in Crime and Delinquency* 204, 207; R Karl Hanson and Kelly E Morton-Bourgon, 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73 *Journal of Consulting and Clinical Psychology* 1154, 1154; David Greenberg et al, 'Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator' (2000) 24 *Child Abuse & Neglect* 1485, 1486.

³ Kamala London et al, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us about the Ways That Children Tell?' (2005) 11 *Psychology, Public Policy, and Law* 194, 204. See the review of the literature in Annie Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010) 34 *Melbourne University Law Review* 69.

⁴ Karen Gelb, 'Recidivism of Sex Offenders' (Research Paper, Sentencing Advisory Council, January 2007) 21, citing Nancy Loucks, 'Recidivism amongst Serious Violent and Sex Offenders' (Report, Scottish Executive Social Research, 2002) 2.

⁵ See Cossins, 'Time Out for Longman', above n 3, 79–82.

⁶ *Ibid* 80.

⁷ *Ibid* 81.

⁸ See Grant T Harris et al, 'A Multisite Comparison of Actuarial Risk Instruments for Sex Offenders' (2003) 15 *Psychological Assessment* 413, 416.

⁹ For example, the following articles on propensity evidence do not discuss recidivism rates: Andrew Palmer, 'Propensity, Coincidence and Context: The Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases' (1999) 4 *Newcastle Law Review* 46; Mike Redmayne, 'The Relevance of Bad Character' (2002) 61 *Cambridge Law Journal* 684; Jeremy Gans, 'Similar Facts after Phillips' (2006) 30 *Criminal Law Journal* 224; David Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609; C R Williams and Sandra Draganich, 'Admissibility of Propensity Evidence in Paedophilia Cases' (2006) 11 *Deakin Law Review* 1.

This article summarises the literature on CSO recidivism, choice of victim and types of sexual behaviours. It presents a 16 year literature review which shows that estimates of reoffending are highly dependent on methodology, including the length of the follow-up of the offenders under study.

Since this information has not informed the development of trial processes, procedure and evidence law in Australia, this article will consider its implications for the prosecution of serial CSOs in trials with multiple complainants. In particular, the article will consider the implications of serial CSO behaviour for the rules used at common law and under the uniform *Evidence Acts* ('UEAs')¹⁰ for excluding evidence known as tendency/propensity and coincidence/similar fact evidence.

In analysing two distinct lines of authority from the courts of appeal in New South Wales ('NSW') and Victoria and their use of 'striking similarities' and similar formulations, the article identifies the existence of a belief that CSO behaviour is distinctive in nature and CSOs are highly selective in their choice of victim. These beliefs demonstrate a lack of understanding of CSO behaviours, including: the fact that a core group of offenders will abuse more than one child; the wide variety in offenders' sexual and grooming behaviours; and the fact that recidivism is higher for offenders who exhibit crossover behaviours and commit a diverse range of sex offences.

The article argues that the striking similarities test (and similar formulations) should be abandoned when assessing the admissibility of multiple complainants' evidence in a joint trial and makes recommendations for reform.

II THE LEGAL SIGNIFICANCE OF CHILD SEX OFFENDER BEHAVIOUR

In order for the evidence of two or more complainants to be cross-admissible as propensity or similar fact evidence in a joint trial for child sex offences, the common law requires the evidence to be relevant and to have 'striking similarities'. As discussed below in Part IV, the application of this formulation or test in child sexual assault trials has resulted in detailed comparisons of the types of alleged sexual behaviour committed against multiple complainants by an accused. Where the sexual behaviour is considered to have sufficient similarities, the striking similarities test will be satisfied and the evidence will be admissible if, in addition, the 'no rational view of the evidence' test (also known as the *Pfennig* test) is satisfied.¹¹

The striking similarities test has been adopted in relation to the admissibility of tendency and coincidence evidence under the UEAs,¹² suggesting that when presented with new statutory tests for admissibility judges will still be guided by

¹⁰ See *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

¹¹ *Pfennig v The Queen* (1995) 182 CLR 461 ('*Pfennig*'). See text accompanying below n 158 for an explanation of the *Pfennig* test.

¹² See below Part IV(B).

the common law in the absence of clear guidance from legislatures on how to apply these tests.

If an accused's alleged sexual conduct with one victim differs in *type* from his alleged sexual conduct with another, it is generally considered that there will be no striking similarities between the evidence of the victims. For example, in a Queensland case involving four victims who ranged in age from 6 months to 12 years,¹³ Holmes JA held that '[t]he fact that the appellant had interfered with A [aged 12 years] in certain ways did not go very far to prove that he had molested B [aged 8 years] in quite different ways.'¹⁴ Holmes JA also stated that

none of the evidence concerning indecent dealing with A and B themselves was admissible in respect of [the charges involving the defendant's infant children]; by no stretch of the imagination could one say that the dealings with them had any similar fact relationship with what happened to the infants.¹⁵

These and similar views expressed in other cases indicate the existence of a belief that CSO behaviour is distinctive in nature and CSOs are highly selective in their choice of victim. These views raise a number of questions which are the subject of this article: to what extent *are* CSOs likely to engage in repeat and serial offending? Do they always choose victims of the same age and sex? To what extent does their sexual behaviour with children vary?

III THE CHARACTERISTICS OF CHILD SEX OFFENDER BEHAVIOUR

A *The Specialisation and Persistence of Child Sex Offenders*

There are many features concerning the behaviour of CSOs that can be discerned from the literature, including reoffending rates and whether all types of CSOs reoffend at the same rate. For example, in studies of the specialisation of rapists compared to CSOs, researchers have found that all types of sex offenders commit a range of non-sex offences during their criminal careers, although CSOs are much more likely than rapists to 'specialise' in sex offences.¹⁶ This degree of specialisation means CSOs are more likely to be repeat sex offenders and to have multiple victims.

Nonetheless, there is considerable debate about the recidivism rates of CSOs. Table 1 sets out recidivism rates reported in the literature from 1995 to 2011. Where possible, CSOs are categorised according to their relationship with a child victim;¹⁷ however, most studies in Table 1 did not make a distinction between

¹³ *R v KP; Ex parte A-G (Qld)* [2006] QCA 301 (22 August 2006).

¹⁴ *Ibid* [60].

¹⁵ *Ibid* [61].

¹⁶ Harris et al, above n 8, 416–17; Naomi J Freeman, 'Predictors of Rearrest for Rapists and Child Molesters on Probation' (2007) 34 *Criminal Justice and Behavior* 752.

¹⁷ These categories include intra-familial offenders (those who have sexually abused related children), extra-familial offenders (those who have sexually abused unrelated children) and mixed-type offenders (those who have sexually abused related and unrelated children). Although there are good reasons for arguing that this categorisation is artificial because of the degree of overlap between intra-familial and extra-familial offenders, the distinction remains: Anne Cosins, 'A Reply to the NSW Royal Commission Inquiry into Paedophilia: Victim Report Studies

different offender types. While it is beyond the scope of this article to engage with the literature on actuarial predictions of an offender's risk of recidivism, measures of risk are dependent on the measure of recidivism used.¹⁸

Table 1: Review of Recidivism Rates of CSOs 1995–2011¹⁹

Study	Sample Size	Offender Type*	Follow-Up Period	Measure of Recidivism	Recidivism Rate (%)
Hanson, Scott and Steffy (1995) ²⁰	191	intra- and extra-familial	15 to 30 years	re-conviction	35.1
Prentky et al (1997) ²¹	115	CSOs	25 years	charge	32 (52 FR**)
				re-conviction	25 (41 FR**)
				imprisonment	23 (37 FR**)
Firestone et al (1999) ²²	251	intra-familial	average 6.7 years	rearrest or re-conviction	6.4
Firestone et al (2000) ²³	192	extra-familial	average 7.8 years	rearrest or re-conviction	15.1

and Child Sex Offender Profiles — A Bad Match?' (1999) 32 *Australian and New Zealand Journal of Criminology* 42.

¹⁸ Leam A Craig et al, 'Sexual Reconviction Rates in the United Kingdom and Actuarial Risk Estimates' (2008) 32 *Child Abuse & Neglect* 121, 130.

¹⁹ This 16 year period was chosen because 1995 represents the publication of the first landmark recidivism study (R Karl Hanson, Heather Scott and Richard A Steffy, 'A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism' (1995) 32 *Journal of Research in Crime and Delinquency* 325), a study that, at the time, used the longest follow-up period (15 to 30 years) of any study conducted and followed both intra- and extra-familial CSOs.

²⁰ Ibid.

²¹ Robert A Prentky et al, 'Recidivism Rates among Child Molesters and Rapists: A Methodological Analysis' (1997) 21 *Law and Human Behavior* 635.

²² Philip Firestone et al, 'Prediction of Recidivism in Incest Offenders' (1999) 14 *Journal of Interpersonal Violence* 511.

²³ Philip Firestone et al, 'Prediction of Recidivism in Extrafamilial Child Molesters Based on Court-Related Assessments' (2000) 12 *Sexual Abuse: A Journal of Research and Treatment* 203.

Study	Sample Size	Offender Type*	Follow-Up Period	Measure of Recidivism	Recidivism Rate (%)
Soothill et al (2000) ²⁴	763	heterosexual CSOs	average 15 years	re-conviction	19.3
Beech et al (2002) ²⁵	53	CSOs	6 years	re-conviction	15
Greenberg et al (2000) ²⁶	400	extra-familial	average 7 years	charge or re-conviction	16.2 (acquaintances) 9.7 (strangers)
Serin, Mailloux and Malcolm (2001) ²⁷	3	intra-familial	7 years	re-conviction or violation of conditions of release	3.0
	8	extra-familial			1.5
Hood et al (2002) ²⁸	35	intra-familial	6 years	re-conviction	0
	19	extra-familial			26.3
Scalora and Garbin (2003) ²⁹	194	treated and untreated CSOs	average 4.5 years	charge	24.7

²⁴ Keith Soothill et al, 'Sex Offenders: Specialists, Generalists — Or Both? A 32-Year Criminological Study' (2000) 40 *British Journal of Criminology* 56.

²⁵ Anthony Beech et al, 'The Relationship between Static and Dynamic Risk Factors and Reconviction in a Sample of UK Child Abusers' (2002) 14 *Sexual Abuse: A Journal of Research and Treatment* 155.

²⁶ Greenberg et al, above n 2.

²⁷ Ralph C Serin, Donna L Mailloux and P Bruce Malcolm, 'Psychopathy, Deviant Sexual Arousal, and Recidivism among Sexual Offenders' (2001) 16 *Journal of Interpersonal Violence* 234.

²⁸ Roger Hood et al, 'Sex Offenders Emerging from Long-Term Imprisonment' (2002) 42 *British Journal of Criminology* 371.

²⁹ Mario J Scalora and Calvin Garbin, 'A Multivariate Analysis of Sex Offender Recidivism' (2003) 47 *International Journal of Offender Therapy and Comparative Criminology* 309.

Study	Sample Size	Offender Type*	Follow-Up Period	Measure of Recidivism	Recidivism Rate (%)
Bartosh et al (2003) ³⁰	37	intra-familial	5 to 5.5 years	rearrest	11
	59	extra-familial			14
Langevin et al (2004) ³¹	46	intra-familial	25 years	re-conviction	51.1
				charge	60.0
				self-report and official data***	84.2
	142	extra-familial	re-conviction	73.7	
		charge	79.0		
		self-report and official data***	94.1		
Soothill et al (2005) ³²	103	convicted CSOs	average 15 years	re-conviction	20
	116	suspected CSOs			9
Patrick and Marsh (2009) ³³	447	CSOs	2 to 15 years	re-conviction	9.2
Goodman-Delahunty (2009) ³⁴	214	intra-familial	3 to 18 years survival rate	charge or re-conviction	10.7

³⁰ Darci L Bartosh et al, 'Differences in the Predictive Validity of Actuarial Risk Assessments in Relation to Sex Offender Type' (2003) 47 *International Journal of Offender Therapy and Comparative Criminology* 422.

³¹ Ron Langevin et al, 'Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study' (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 531.

³² Keith Soothill et al, 'Identifying Future Repeat Danger from Sexual Offenders against Children: A Focus on Those Convicted and Those Strongly Suspected of Such Crime' (2005) 16 *Journal of Forensic Psychiatry & Psychology* 225.

³³ Steven Patrick and Robert Marsh, 'Recidivism among Child Sexual Abusers: Initial Results of a 13-Year Longitudinal Random Sample' (2009) 18 *Journal of Child Sexual Abuse* 123.

³⁴ Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes* (Sydney West Area Health Services, 2009).

Study	Sample Size	Offender Type*	Follow-Up Period	Measure of Recidivism	Recidivism Rate (%)
Parent, Guay and Knight (2011) ³⁵	275	CSOs	10 years	charge	17.4

Notes to Table 1:

- * This table only includes studies that reported the recidivism rate for CSOs and does not include studies that did not differentiate between rapists and CSOs.
- ** FR means ‘failure rate’, which is ‘an estimate that takes into account the amount of time each offender has been on the street and [is] thus able to reoffend.’³⁶ It is considered to be a more accurate estimate of recidivism.
- *** Official data included police databases, hospital records and legal databases.

Before discussing the data in Table 1, three meta-analytic studies and one large-scale study are also reviewed here. Such studies are statistically more powerful because they comprise a larger cohort of offenders than the individual studies in Table 1. They also contain analyses which enable the predictors of recidivism to be identified.

In 1998, Hanson and Bussière’s large-scale study used a meta-analytic technique for integrating data from 61 studies involving 28 972 sex offenders.³⁷ For the 9603 CSOs in the study, who were not differentiated into types, they reported a recidivism rate of 12.7 per cent for an average follow-up period of four to five years.³⁸ They also identified the factors that significantly correlated with recidivism, including sexual arousal to children and prior arrests or convictions for a sex offence.³⁹ Recidivism was higher for those CSOs who had committed a diverse range of sex offences,⁴⁰ suggesting that serial offenders may be more likely than other offenders to engage in different types of sex offences.

In 2004, the meta-analytic study by Harris and Hanson provided recidivism rates for 2595 CSOs at 5, 10 and 15 years.⁴¹ Most had been released from prison

³⁵ Geneviève Parent, Jean-Pierre Guay and Raymond A Knight, ‘An Assessment of Long-Term Risk of Recidivism by Adult Sex Offenders: One Size Doesn’t Fit All’ (2011) 38 *Criminal Justice and Behavior* 188.

³⁶ Prentky et al, above n 21, 641.

³⁷ R Karl Hanson and Monique T Bussière, ‘Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies’ (1998) 66 *Journal of Consulting and Clinical Psychology* 348.

³⁸ Ibid 351. Although this study was updated in 2005, no separate recidivism rate was reported for CSOs: Hanson and Morton-Bourgon, above n 2.

³⁹ Hanson and Bussière, ‘Predicting Relapse’, above n 37, 351–3. See also R Karl Hanson and Monique T Bussière, ‘Predictors of Sexual Offender Recidivism: A Meta-Analysis’ (Report No 1996-04, Department of the Solicitor General of Canada, 1996).

⁴⁰ Hanson and Bussière, ‘Predicting Relapse’, above n 37, 351.

⁴¹ Andrew J R Harris and R Karl Hanson, ‘Sex Offender Recidivism: A Simple Question’ (Report No 2004-03, Public Safety and Emergency Preparedness Canada, 2004) <<http://www.publicsafety.gc.ca/res/cor/rep/cprindex-eng.aspx>>.

and came from 10 different samples, a majority of which used re-conviction as the recidivism measure. After 15 years, the recidivism rates were 13 per cent (intra-familial offenders), 16 per cent (heterosexual extra-familial offenders) and 35 per cent (homosexual extra-familial offenders).⁴²

Generally, these rates are similar to the rates from the studies listed in Table 1 that used re-conviction as the recidivism measure, but are lower than those from the studies that used charges and rearrest. Notably, '[o]ffenders with a prior sexual offence conviction had recidivism rates about double the rate observed for first-time sexual offenders (19% versus 37% after 15 years)',⁴³ while those under the age of 50 years were more likely to reoffend after 15 years compared to older offenders.⁴⁴

In a review of 16 British studies, Craig et al reported the mean re-conviction rates of eight incarcerated (n = 5195) and eight non-incarcerated (n = 1274) samples of CSOs at 2 years, 4 years and 6 years or more.⁴⁵ Incarcerated offenders showed a slightly higher recidivism rate after 6 years or more (19.5 per cent) compared to non-incarcerated offenders (15.5 per cent).

Craig et al's comparison of a group of relatively high-risk CSOs with a relatively low-risk group can be contrasted with Freeman's study that included all registered male CSOs on probation (a relatively low-risk group) as at August 2005 in New York State (n = 4700).⁴⁶ Freeman found that the reoffending patterns of probationers mirrored those of incarcerated CSOs, an unexpected result given that incarcerated offenders are generally considered to be more likely to reoffend. Using rearrest as the measure of recidivism and a follow-up period of three years, Freeman reported a recidivism rate of 5.7 per cent. This was identical to the rate reported by Craig et al for non-incarcerated offenders after two years and almost the same as the rate for incarcerated offenders (6 per cent) after two years.⁴⁷

However, the CSOs in Freeman's study were more likely to be rearrested for a non-sex offence than a sex offence (30.1 per cent compared to 5.7 per cent), which may be due to the *visibility* of the particular non-sex offences (assault, drug offences, vehicle/traffic violations and failure to register with the New York sex offender register) compared to child sexual assault.

⁴² Ibid 8.

⁴³ Ibid 7. See also Jackie Craissati et al, 'Risk, Reconviction Rates and Pro-Offending Attitudes for Child Molesters in a Complete Geographical Area of London' (2002) 8(1) *Journal of Sexual Aggression* 22; Firestone et al, 'Prediction of Recidivism in Incest Offenders', above n 22.

⁴⁴ Harris and Hanson, above n 41, 7.

⁴⁵ Craig et al, above n 18.

⁴⁶ Freeman, above n 16. No differentiation was made between CSO types.

⁴⁷ Craig et al, above n 18.

Freeman found that

the best predictor of rearrest for a sexual offense for both rapists and child molesters was number of prior sexual offense arrests. Each additional prior sexual offense arrest increased the probability of a rapist being rearrested for a sexual offense by 0.1%, *whereas it increased the likelihood of a child molester being rearrested by 15.7%*.⁴⁸

There were three additional variables that were significant predictors for the rearrest of CSOs in Freeman's study: the victim's sex, the number of victims in the 'instant offence' and the CSO's age at the time of the instant offence.⁴⁹ Those CSOs who had more than one victim in the instant offence and who had a male victim were more likely to be rearrested — each additional victim increased the likelihood of a CSO being rearrested by 2.7 per cent, and an offender was also 2.7 per cent more likely to be rearrested if the alleged victim was male.⁵⁰ Similarly, younger CSOs were more likely to be rearrested for a sexual offence — every one year increase in age reduced the likelihood of rearrest by 0.3 per cent.⁵¹

1 *Recidivism Studies: Their Strengths and Limitations — Methodological Factors*

Generally speaking, the broader the definition of recidivism and the longer the follow-up period, the higher the recidivism rate. In analysing the data reported in Table 1, the most important caveat is that 'recidivism rates ... are gross under-representations of the real number of offenses committed, no matter what criteria are used'.⁵² This can be seen in the wide variation in the rates in Table 1 (from 0 per cent to 94.1 per cent). This variation arises from a number of methodological factors, such as the sample size of the studies (from 11 to 763) the proportions of different types of offenders included in the sample, the follow-up period (from 2 to 31 years), the measure of recidivism, and whether the sample included high-risk offenders.

While there is a good argument that the recidivism rates reported in meta-analytic studies should be given greater weight than the rates from individual studies, Hanson and Bussière warned that their recidivism rate should be treated with caution because it was based on 61 studies with a diverse range of measures of recidivism, offender types and follow-up periods.⁵³ Meta-analyses can also 'easily neglect potentially important differences between studies' such as offender types and offender settings.⁵⁴

⁴⁸ Freeman, above n 16, 761 (emphasis added).

⁴⁹ Ibid. The instant offence was the one the subject of the probation order.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Firestone et al, 'Prediction of Recidivism in Incest Offenders', above n 22, 523.

⁵³ Hanson and Bussière, 'Predicting Relapse', above n 37, 351.

⁵⁴ Hanson and Morton-Bourgon, above n 2, 1159.

CSOs are known to commit a wide range of both sexual and non-sexual offences,⁵⁵ although estimates of the recidivism rate of American CSOs are limited by the frequency of plea bargaining in the United States: 'sex offences are often reclassified through plea bargaining as violent non-sexual charges ... and even as property offences (such as break and enter) if, for example, an offender is foiled in an attempted rape'.⁵⁶ The use of new charges as the measure of recidivism 'avoids certain limitations associated with the use of conviction as [the] measure ... especially those related to plea bargaining', where sexual charges are modified into non-sexual charges in order to obtain a guilty plea,⁵⁷ thus turning high-risk offenders into apparently low-risk offenders.

From the data listed in Table 1 and reported in the meta-analytic studies, several trends emerge. Recidivism rates will vary widely based on the measure of recidivism that is used. Where re-conviction is used as the measure of recidivism, lower rates of recidivism are reported than when measures such as rearrest, charges or self-report data are used. For example, in the study by Prentky et al '[t]he rate of recidivism using conviction or incarceration was two thirds that of the rate using charge throughout the study period'.⁵⁸ Similarly, Doren recalculated the recidivism rate reported by Hanson, Scott and Steffy by reference to the likely charge rate.⁵⁹ As a result, Doren found 'a more accurate'⁶⁰ recidivism range of 44.6 per cent to 51.6 per cent compared to the recidivism rate of 35.1 per cent based on reconviction data that had been reported by Hanson, Scott and Steffy.⁶¹ Similarly, recidivism rates are higher where lifetime failure rates are calculated.

Langevin et al reported the highest recidivism rates out of any study in Table 1. Using both official and self-report data as their recidivism measures, 94.1 per cent of 142 extra-familial offenders and 84.2 per cent of 46 intra-familial offenders had reoffended after 25 years, one of the longest follow-up periods in Table 1.⁶² Furthermore, Langevin et al reported the percentage of undetected

⁵⁵ Stephen Smallbone and Richard Wortley, *Child Sexual Abuse in Queensland: Offender Characteristics and Modus Operandi* (Queensland Crime Commission and Queensland Police Service, 2000) <<http://www.cmc.qld.gov.au/research-and-publications>> xii; Stephen W Smallbone and Richard K Wortley, 'Criminal Diversity and Paraphilic Interests among Adult Males Convicted of Sexual Offenses against Children' (2004) 48 *International Journal of Offender Therapy and Comparative Criminology* 175; Patrick Lussier, 'The Criminal Activity of Sexual Offenders in Adulthood: Revisiting the Specialization Debate' (2005) 17 *Sexual Abuse: A Journal of Research and Treatment* 269, 282–3. See also Greenberg et al, above n 2.

⁵⁶ Langevin et al, above n 31, 534.

⁵⁷ Parent, Guay and Knight, above n 35, 194. For example, Erikson and Friendship reported that 60 per cent of child abductions that were recorded as violent offences only, while the sexual element was not recorded, were in fact sexually motivated: Matt Erikson and Caroline Friendship, 'A Typology of Child Abduction Events' (2002) 7 *Legal and Criminological Psychology* 115.

⁵⁸ Prentky et al, above n 21, 650.

⁵⁹ Dennis M Doren, 'Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Predator" Commitment Laws' (1998) 16 *Behavioral Sciences and the Law* 97.

⁶⁰ *Ibid* 103.

⁶¹ Hanson, Scott and Steffy, above n 19.

⁶² Langevin et al also reported non-sexual offence recidivism rates. Because '[s]ome violent and property offences were clearly sexual in nature' they concluded that their recidivism rates for sex offences were an underestimate: Langevin et al, above n 31, 548.

offences in the criminal histories of 142 extra-familial CSOs as 76.5 per cent, and of 46 intra-familial offenders as 71.8 per cent, indicating that even after a 25 year period around three quarters of these CSOs' crimes remained undetected. Langevin et al's findings stand in stark contrast to those from other studies which have concluded that CSOs reoffend at relatively low levels and intra-familial offenders are less dangerous than extra-familial offenders because they are less likely to reoffend.⁶³

The high rates reported by authors such as Doren and Langevin et al suggest that the rates from other studies listed in Table 1, which range from 0 to 35.4 per cent, could be significant underestimates. However, there are key limitations to Langevin et al's study. The first is the relatively small size of the study samples, particularly in relation to intra-familial offenders (n = 46). The second is that other studies which used long follow-up periods did not produce similarly high rates. This suggests that the particular sample of CSOs studied by Langevin et al — those referred for psychiatric treatment — was another limitation because these offenders may reoffend at higher rates than other CSOs. Even so this limitation is not clear-cut since the period of referral (1966–74) for the CSOs in Langevin et al's study was a time when psychiatry was sometimes used as an alternative to a criminal charge and there was a belief that deviant sexual behaviour could be cured by standard psychiatric treatment.⁶⁴

Another trend that emerges from Table 1 is the longer the follow-up period, the higher the recidivism rate. This is graphically illustrated in the study by Harris and Hanson, who calculated recidivism rates at 5, 10 and 15 years.⁶⁵ For 'boy victim' extra-familial offenders the rate of recidivism increased from 23 per cent at 5 years to 35 per cent at 15 years, and for 'girl victim' extra-familial offenders the rate of recidivism increased from 9 per cent at 5 years to 16 per cent at 15 years. For intra-familial offenders, the rate of recidivism doubled (from 6 per cent to 13 per cent) within the same period.⁶⁶

Similarly, Prentky et al, who followed CSOs over a 25 year period, noted that '[i]f [they] had restricted [their] follow-up to the conventional exposure period of 12 or 24 months, [they] would have erred by approximately 45% or 40%, respectively.'⁶⁷ The results of Langevin et al's study also support long follow-up periods since the average time span of the criminal histories of the CSOs in their study was almost two decades.⁶⁸ In fact, long follow-up periods are essential to estimating recidivism rates, since between 47.9 per cent⁶⁹ and 69 per cent⁷⁰ of children will not have reported within five years of the abuse.

Recidivism rates will also vary depending on sample size, sample composition and the source from which offenders are obtained. Where a study sample has a

⁶³ See, eg, Harris and Hanson, above n 41.

⁶⁴ See Langevin et al, above n 31, 536.

⁶⁵ Harris and Hanson, above n 41.

⁶⁶ *Ibid* 8.

⁶⁷ Prentky et al, above n 21, 650.

⁶⁸ Langevin et al, above n 31, 550.

⁶⁹ Cossins, 'Time Out for *Longman*', above n 3, 74 (table 2).

⁷⁰ *Ibid* 72 (table 1).

larger proportion of serial offenders, this will increase but also skew the recidivism rate, as will the inclusion of a larger proportion of offenders older than 50 years who are either less likely to reoffend compared to younger age groups⁷¹ or are more adept at avoiding detection. Similarly, 'offenders committed to a state hospital ... [and offenders from] a maximum security psychiatric hospital ... are likely to differ in ways that would affect their recidivism rates and make cross-sample comparisons difficult.'⁷² This argument also applies to samples which include CSOs who have completed a treatment program and those who have not. For example, Scalora and Garbin reported that treated offenders were much less likely to reoffend compared to those who had dropped out of treatment or for whom treatment was unsuccessful (2.1 per cent compared to 25 per cent).⁷³ The proportion of different types of offenders (intra-familial versus extra-familial and mixed type) in a study sample is also considered to account for variations in recidivism rates in different studies, because intra-familial offenders are thought to reoffend at a much lower rate than extra-familial offenders.⁷⁴

However, just over half of the studies in Table 1 did not differentiate between types of CSOs. Of the ones that did, extra-familial offenders reoffended at a considerably higher rate than intra-familial offenders. But even this is a generalisation with exceptions, since intra-familial offenders under the age of 25 years when released from prison show higher recidivism rates than extra-familial offenders.⁷⁵ As well, few studies have considered the rates of disclosure by children and the particular factors that predict disclosure, such as stranger abuse, and that predict non-disclosure, such as long-term intra-familial abuse.

In fact, a possibility not recognised in most of the studies listed in Table 1 is that intra-familial offenders may sexually abuse their own children for many years, engaging in repeat abuse of one or two victims, while extra-familial offenders may abuse several victims. A single charge of child sexual assault 'may represent years of abuse of a single victim',⁷⁶ thus resulting in an underestimation of an intra-familial offender's criminal behaviour, particularly where follow-up periods are relatively short.

In a recent study of *low-risk* intra-familial offenders, Goodman-Delahunty reported that the vast majority (90 per cent) had offended on more than one occasion⁷⁷ and 86 per cent had committed a penetrative offence.⁷⁸ For a majority of the 214 participants in the study, 'the index offence was not the most extensive abusive behaviour by the offender, demonstrating that intrafamilial offend-

⁷¹ Craig et al, above n 18, 130; Freeman, above n 16, 761; Harris and Hanson, above n 41, 7.

⁷² Prentky et al, above n 21, 636.

⁷³ Scalora and Garbin, above n 29, 314.

⁷⁴ James Vess, 'Risk Assessment of Sexual Offenders for Extended Supervision Orders in New Zealand: Basic Principles and Current Practice' (2009) 18 *Journal of Child Sexual Abuse* 174, 178.

⁷⁵ R Karl Hanson, 'Recidivism and Age — Follow-Up Data from 4,673 Sexual Offenders' (2002) 17 *Journal of Interpersonal Violence* 1046.

⁷⁶ Langevin et al, above n 31, 534.

⁷⁷ Goodman-Delahunty, above n 34, 77.

⁷⁸ *Ibid* 107.

ers are more deviant ... than has often been presumed.⁷⁹ In fact, the wide range of abusive acts committed by these offenders 'indicated that the sexually deviant practices exhibited by this group of intrafamilial [CSOs] was similar to those of extrafamilial [CSOs].'⁸⁰ It is, therefore, possible that, given the relatively low reporting rate of children victimised by a family member,⁸¹ intra-familial offenders are less likely to be detected and 'merit longer-term follow-up and a re-evaluation of their sexual preferences and general criminality'.⁸²

2 *Recidivism Studies: Their Strengths and Limitations — Criminal Justice and Victim Factors*

An individual's recidivism risk will differ from his group's rate 'to the extent that the offender differs from "typical" members of the group' by committing more or less sex offences.⁸³ However, rates of recidivism are dependent on a child or parent making a report to the police. If recidivism measures such as charges and re-conviction are used, then high attrition rates at the investigation and prosecutorial stages must be recognised as having a significant effect on recidivism rates. However, the discussion in many recidivism studies assumes that each CSO who reoffends has exactly the same chance of being arrested, charged and/or convicted.

In fact, there is no level playing field when it comes to the detection and prosecution of child sexual abuse because of diverse factors such as a child's age, relationship with the offender, relationship with their parents, access to the police and emotional stability to give evidence; an offender's silencing methods; parental denial; quality of the police investigation; presence or absence of corroborating evidence; low guilty plea rates; and low conviction rates at trial.⁸⁴

Although Harris and Hanson concluded that 73 per cent of all sex offenders in their meta-analytic study had not reoffended after 15 years, and that 'strong contradictory evidence is necessary to substantially change these recidivism estimates',⁸⁵ the above factors mean such confidence may be misplaced, at least in relation to CSOs. In fact, two reviews of studies on the reporting rates of child sexual abuse confirm that long delays are a typical feature of this particular crime.⁸⁶ This means that child sexual abuse is unlike many other types of offences which are more visible because of high-level policing (eg assault and public order offences) or higher rates of reporting (eg motor vehicle theft and serious violent crime).⁸⁷ While CSOs are more likely to be re-convicted of

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ See Cossins, 'Time Out for *Longman*', above n 3, 79–82.

⁸² Langevin et al, above n 31, 549.

⁸³ Harris and Hanson, above n 41, 9.

⁸⁴ See below n 89.

⁸⁵ Harris and Hanson, above n 41, 11.

⁸⁶ London et al, above n 3; Cossins, 'Time Out for *Longman*', above n 3.

⁸⁷ In the United States in 2010, 83.4 per cent of motor vehicle thefts, 60.1 per cent of aggravated assaults and 58.8 per cent of burglaries were reported to the police compared to 50 per cent of rapes/sexual assaults: Jennifer L Truman, 'National Crime Victimization Survey: Criminal Victimization, 2010' (NCJ 235508, Bureau of Justice Statistics, United States Department of Justice,

violent or property offences,⁸⁸ what cannot be discounted is the visibility of these crimes compared to child sexual abuse, and the impact of plea bargaining.

Another issue not discussed in the literature is that some recidivism rates are remarkably similar to the estimated likelihood of an offender being convicted once a report is made to the police which, in Australia, is 8 to 10 per cent.⁸⁹ Given the low reporting rates by children, combined with high attrition rates of child sex offences at the policing and prosecutorial stages, recidivism rates using re-conviction as the measure might be measuring nothing more than the (low) probability of an offender proceeding to trial and conviction.⁹⁰ Statistically speaking, the likelihood of a child reporting the abuse and that report resulting in a conviction is very low indeed.

3 Summary

This literature review has shown that, depending on the offender sample, the follow-up period and the measure of recidivism, reoffending will be an issue for a significant proportion of CSOs — from around 5 to 30 per cent for low-risk offenders to around 90 per cent for high-risk offenders. Not only are there several methodological issues that make it difficult to estimate precise rates, there are also many victim and criminal justice factors that militate against the detection and prosecution of child sex offences which are not taken into account in most recidivism studies.

B Crossover and Variation in Child Sex Offender Behaviour

CSO behaviour is characterised by certain elements that challenge many of the beliefs in the case law about CSO choice of victim and sexual misconduct. These elements include 'crossover' behaviours (ie the extent to which CSOs choose victims of different gender, age and relationship) and variation in sexual behaviour with different victims. This information has been reported by a number of

September 2011). No reporting figures were given for child sexual assault. The United States Bureau of Justice Statistics reported that, between 1992 and 2000, 74 per cent of completed sexual assaults were not reported to police: Callie Marie Rennison, 'Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000' (NCJ 194530, Bureau of Justice Statistics, United States Department of Justice, August 2002). Australian Bureau of Statistics data shows that only 18.9 per cent of people who said they had been sexually assaulted in the 12 months prior to the survey made a report to the police: Australian Bureau of Statistics, *Personal Safety Survey: Australia*, ABS Catalogue No 4906.0 (2005) 21.

⁸⁸ Freeman, above n 16, 749. See also Soothill et al, 'Sex Offenders: Specialists, Generalists — Or Both?', above n 24, 64.

⁸⁹ Of child sexual assault cases recorded by police in South Australia from 1 July 2000 to 30 June 2001, Wundersitz found that only 10.6 per cent of 952 incidents progressed from initial report to a court outcome: Joy Wundersitz, 'Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court' (Research Findings, Office of Crime Statistics and Research (SA), May 2003) 8. Similarly, Fitzgerald reported that criminal proceedings are initiated in relation to only 15 per cent of child sexual assault incidents reported to police in NSW, while only approximately 8 per cent of recorded child sexual assaults result in a conviction: Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (Contemporary Issues in Crime and Justice No 92, New South Wales Bureau of Crime Statistics and Research, January 2006) 4.

⁹⁰ See Langevin et al, above n 31, 533, citing Hood et al, above n 28.

researchers who have conducted self-report studies with offenders. The key findings from these studies are presented below.

1 *Features of Self-Report Studies*

Self-report studies of CSOs are difficult and time-consuming to conduct since they require surveys of a known population of offenders (such as clinical or incarcerated groups) who must be given guarantees of confidentiality for the data to be considered reliable. However, 'the ability of this approach to measure undetected offending makes it a valuable complement to research based on official sources of data.'⁹¹

While it is possible that offenders under-report their offences in self-report studies, generally these studies reveal 'a greater proportion of the "true" prevalence of offending than do official reports',⁹² indicating that 'the gap between actual and officially recorded sex offending ... is enormous'.⁹³ This gap suggests that 'a certain proportion of [the] child molester population are actively perpetrating acts of sexual violence against children for some two decades before they are detected by an authority agency'.⁹⁴

Indeed, if the recidivism rates for serial CSOs are reflected in the cases that come to court (and no study has as yet followed the *progress* of CSOs who reoffend through the criminal justice system), then it can be expected that police and prosecutors will be dealing with a significant proportion of cases involving an offender with multiple victims.

2 *The Crossover Behaviour of Child Sex Offenders*

More than 20 years ago, Abel et al conducted the first study to determine whether or not sex offenders sexually abused only one type of victim or whether they chose multiple victim types.⁹⁵ They reported that 20 per cent of 561 sex offenders crossed over between male and female victims, 23.3 per cent crossed over between children related to them and unrelated victims, and just over 42 per cent crossed over between age groups (children, adolescents and adults).⁹⁶

Other studies have reported similar results. In 1991, Weinrott and Saylor found that 34 per cent of extra-familial CSOs sexually abused children related to them while 50 per cent of intra-familial CSOs reported abusing an unrelated child.⁹⁷ Twelve years later, in a study of 255 CSOs, Heil, Ahlmeyer and Simons found that a much larger proportion of intra-familial offenders said they had sexually abused unrelated children (64 per cent) while 53 per cent of extra-familial

⁹¹ Gelb, above n 4, 21.

⁹² Ibid. Generally, self-report studies are considered to be reliable: see Gene G Abel et al, 'Multiple Paraphilic Diagnoses among Sex Offenders' (1988) 16 *Bulletin of the American Academy of Psychiatry and the Law* 153, 166; Mark R Weinrott and Maureen Saylor, 'Self-Report of Crimes Committed by Sex Offenders' (1991) 6 *Journal of Interpersonal Violence* 286.

⁹³ Miethe, Olson and Mitchell, above n 2, 224.

⁹⁴ Greenberg et al, above n 2, 1489.

⁹⁵ Abel et al, above n 92.

⁹⁶ Ibid 158.

⁹⁷ Weinrott and Saylor, above n 92, 292.

offenders reported sexually abusing children who were related to them.⁹⁸ In 2010, an Australian study reported that 48 per cent of 128 CSOs selected children from different age groups, while 25.8 per cent selected both related and unrelated victims.⁹⁹

In fact, in various studies, significant minorities of CSOs have admitted to selecting victims from *both* sexes, with proportions including 21 per cent,¹⁰⁰ 22 per cent,¹⁰¹ 28 per cent¹⁰² and 63 per cent.¹⁰³

These crossover behaviours have implications for recidivism since CSOs who abused both boys and girls were three times more likely to have preschool aged victims than offenders who had older victims,¹⁰⁴ while offenders who engaged in crossover behaviour were more likely to have more victims and to be at risk of recidivism¹⁰⁵ than offenders who did not. Similarly, offenders who selected victims from different age groups also had more victims.¹⁰⁶

These studies suggest that between one fifth and two thirds of CSOs will have multiple victims and that their sexual behaviour will vary according to the age and sex of the child. This hypothesis is supported by a detailed Australian self-report study carried out by Smallbone and Wortley in relation to 182 incarcerated male CSOs who completed a self-report questionnaire about their sex offending history.¹⁰⁷ The sample comprised 79 intra-familial offenders, 60 extra-familial offenders, 30 mixed-type offenders (those with related and unrelated victims) and 13 deniers.¹⁰⁸ Most (73.3 per cent) reported they had female victims.¹⁰⁹ Most extra-familial offenders (86.7 per cent) and mixed-type offenders (89.6 per cent) reported sexual contact with children known to them¹¹⁰ while only 6.5 per cent

⁹⁸ Peggy Heil, Sean Ahlmeyer and Dominique Simons, 'Crossover Sexual Offenses' (2003) 15 *Sexual Abuse: A Journal of Research and Treatment* 221, 232.

⁹⁹ Daphne J Sim and Michael Proeve, 'Crossover and Stability of Victim Type in Child Molesters' (2010) 15 *Legal and Criminological Psychology* 401, 405.

¹⁰⁰ Michael A O'Connell, *Using Polygraph Testing to Assess Deviant Sexual History of Sex Offenders* (PhD Thesis, University of Washington, 1997) 58 (103 CSOs).

¹⁰¹ *Ibid* (128 CSOs).

¹⁰² Michele Elliott, Kevin Browne and Jennifer Kilcoyne, 'Child Sexual Abuse Prevention: What Offenders Tell Us' (1995) 19 *Child Abuse & Neglect* 579, 583 (91 CSOs).

¹⁰³ Heil, Ahlmeyer and Simons, above n 98 (255 CSOs).

¹⁰⁴ Jill S Levenson, Jennifer Becker and John W Morin, 'The Relationship between Victim Age and Gender Crossover among Sex Offenders' (2008) 20 *Sexual Abuse: A Journal of Research and Treatment* 43.

¹⁰⁵ Sim and Proeve, above n 99, 405; Jenny Cann, Caroline Friendship and Lynsey Gozna, 'Assessing Crossover in a Sample of Sexual Offenders with Multiple Victims' (2007) 12 *Legal and Criminological Psychology* 149.

¹⁰⁶ Sim and Proeve, above n 99, 405.

¹⁰⁷ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, xi. Selected findings of this study were summarised in Stephen W Smallbone and Richard K Wortley, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi' (Trends and Issues in Crime and Criminal Justice No 193, Australian Institute of Criminology, February 2001) <<http://aic.gov.au/publications/current%20series/tandi.aspx>>.

¹⁰⁸ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, xi.

¹⁰⁹ *Ibid* 37.

¹¹⁰ *Ibid* xv.

of offenders reported having their first sexual contact with a child who was a stranger.¹¹¹

The 169 offenders who admitted having at least one victim disclosed offences involving 1010 children (748 boys and 262 girls).¹¹² 34.4 per cent of offenders reported sexual contact with two to five children while almost 17 per cent reported contact with six or more.¹¹³ Thus, while just over half of the CSOs reported they had more than one victim, only 38.9 per cent were associated with official convictions. Intra-familial offenders disclosed an average of 1.5 victims, compared to extra-familial offenders (average 6.1 victims) and mixed-type offenders (average 20 victims).¹¹⁴ Most offenders (72 per cent) 'had more than one sexual encounter with their first victim and 28 per cent had more than 10 sexual encounters.'¹¹⁵ In fact, even though intra-familial offenders are considered to be less dangerous than other offender types, they were more likely to have multiple sexual contacts with their first victim and more likely to offend over a longer period of time with their first victim.¹¹⁶

Although a majority of all offenders admitted to a previous sex offence, this was not reflected in previous convictions: only 21.3 per cent had a previous conviction for a sexual offence.¹¹⁷ Offenders admitted to having their first sexual contact with a child many years before being convicted for their current offence — on average, 8.6 years for intra-familial offenders, 10.6 years for extra-familial offenders and 11.5 years for mixed-type offenders¹¹⁸ — supporting the view that convictions are not a reliable method for assessing the frequency of sex offending behaviour. Extra-familial offenders (30.5 per cent) and mixed-type offenders (41.4 per cent) were more likely to have a previous sexual conviction than intra-familial offenders (10.8 per cent),¹¹⁹ most of whom committed their self-reported sexual offences in their own homes,¹²⁰ making detection less likely.

3 *The Variation in Child Sex Offender Behaviour*

The results from Smallbone and Wortley's study confirm the findings from previous self-report studies that CSOs display high levels of sexual misconduct that is never detected by authorities. In other words, CSOs' sexual behaviour is more varied in terms of number of victims and types of sexual misconduct than is recognised by judges and lawyers dealing with child sex offence cases.

¹¹¹ Ibid 39.

¹¹² Ibid xv.

¹¹³ Ibid 37. This data accords with another Australian study which found that out of 128 CSOs, '[t]he number of victims per offender ranged from 2 to 15, with a mean of 3.20 victims': Sim and Proeve, above n 99, 404.

¹¹⁴ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, xv.

¹¹⁵ Smallbone and Wortley, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi', above n 107, 4.

¹¹⁶ Ibid.

¹¹⁷ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, 18.

¹¹⁸ Ibid 15 (table 2).

¹¹⁹ Ibid 19.

¹²⁰ Ibid xvi.

Rather than being confined to one particular *type*, CSO sexual behaviour is best described as involving a continuum, beginning with non-sexual touching, moving to less serious sexual touching to test out a child's reactions and sometimes progressing to serious sexual assault involving oral, digital or penile penetration, depending on access, opportunity, the age of the child, the resistance of the child and the successful use of emotional manipulation, coercion or threats.

Smallbone and Wortley's study revealed the strategies used by 169 CSOs for targeting children, as well as their grooming and sexual behaviours.¹²¹ The study did not support the judicial assumption that offenders specialise in particular types of sexual behaviour.¹²² While this study was not designed to measure the particular sexual behaviours committed by *individual* offenders, as a group, the 169 CSOs committed a diverse range of sexual behaviours. Most admitted to touching a child's genitals (89 per cent), in addition to 17 other sexual acts, including oral sex on the victim (59.8 per cent), penetration of the vagina/anus with a finger (69.6 per cent) or a penis (47 per cent), and masturbation of the victim (46.9 per cent);¹²³ many also admitted to having a child perform sexual acts on them.¹²⁴

Intra-familial offenders admitted to an average of 5.6 different sexual behaviours, while extra-familial offenders admitted to an average of 5.5 and mixed-type offenders admitted to an average of 6.4. As a combined group, the 169 offenders admitted to an average of 6.1 different sexual behaviours.¹²⁵ In other words, CSOs do not appear to 'specialise' in one particular type of sexual contact to the exclusion of other types.

Similar findings were reported by Goodman-Delahunty, who carried out an evaluation of a NSW sex offender treatment program which only accepts intra-familial CSOs who admit their offences.¹²⁶ The 214 male offenders who were the subject of the study (of whom 93 had been accepted into the program and 121 had been declined)¹²⁷ had an average of 1.2 victims.¹²⁸ The mean duration of offending was 3.2 years and the mean number of reported incidents of child sexual abuse was 128.7.¹²⁹ Although the intra-familial offenders had extensive offending histories,¹³⁰ the mean number of charges was 5.7,¹³¹ indicating that a majority of incidents of child sexual abuse do not result in charges being laid.

Goodman-Delahunty also documented the types of abuse that intra-familial offenders had committed. While the most common abusive act was sexual

¹²¹ Ibid 35–64.

¹²² See below Part III(B)(3).

¹²³ Smallbone and Wortley, *Child Abuse in Queensland*, above n 55, 58–9.

¹²⁴ Ibid 59.

¹²⁵ These averages were calculated using the data in *ibid* 58–9.

¹²⁶ Goodman-Delahunty, above n 34, 5.

¹²⁷ Ibid 9.

¹²⁸ Ibid 75.

¹²⁹ Ibid.

¹³⁰ See text accompanying above nn 77–80.

¹³¹ Goodman-Delahunty, above n 34, 75.

touching or fondling (89.7 per cent of all offenders), offenders admitted to 11 other different types of sexual behaviours, including oral abuse (45.8 per cent), exposure (46.7 per cent), digital penetration (37.4 per cent) and vaginal intercourse (34.8 per cent).¹³² The fact that the percentages for each of the 12 different types of offences add up to more than 100 per cent demonstrates that some offenders engaged in two or more sexual behaviours with their victims.

In fact, Goodman-Delahunty undertook analyses of the types of sexual acts committed by offenders and found that 90 per cent committed more than one act of sexual abuse¹³³ while only 5.1 per cent committed one *type* of sexual abuse.¹³⁴ Together, the offenders committed an average of 4.5 different types of sexual acts with the victim of the subject offence, with only 5.6 per cent of offenders committing *one* abusive act during the subject offence.¹³⁵ Offenders who completed treatment admitted to abusive acts that were wider in range and more intrusive than the acts reported by victims,¹³⁶ suggesting that victims under-report the types of sexual abuse perpetrated against them.

4 Summary

Overall, the literature shows that a significant proportion of offenders (between one fifth and two thirds) will have victims of different ages, sexes or relationship (related/unrelated) and that offenders who engage in crossover behaviours are more likely to be at risk of recidivism. In fact, the recidivism studies reviewed in this Part suggest that serial child sex offending is not a rare or unusual event and that offenders who have had more than one victim are more likely to reoffend. However, when multiple victims report abuse by the same person, there are major hurdles to proving that such serial abuse occurred, as discussed in the next Part.

Of those offenders who do have multiple victims, most will have engaged in a *range* of sexual behaviours with their victims. These findings have serious implications for the prosecution of serial CSOs, and ought to inform the decision-making of judges in such cases.

IV IMPLICATIONS FOR THE PROSECUTION OF CHILD SEX OFFENCES

The CSO literature shows that ‘one of the best predictors of sexual recidivism is a previous sex offense’ conviction¹³⁷ along with prior charges.¹³⁸ In fact, ‘any previous accusations of sexual abuse may signal a pattern of sexually abusive

¹³² Ibid 76.

¹³³ Ibid 77.

¹³⁴ Ibid 79.

¹³⁵ Ibid 78.

¹³⁶ Ibid 111.

¹³⁷ Greenberg et al, above n 2, 1491. See also Prentky et al, above n 21, 654; Hanson and Bussière, ‘Predicting Relapse’, above n 37, 351.

¹³⁸ See R Karl Hanson, ‘The Development of a Brief Actuarial Scale for Sexual Offense Recidivism’ (Report No 1997-4, Department of the Solicitor General of Canada, 1997).

behaviour'¹³⁹ — that is, (in legal terminology) a *tendency* to act in a particular way. The case law discussed in the next two sections reveals the assumption that serial CSOs specialise in relation to the age, sex and relationship of their victims and in relation to particular types of sexual behaviours. Since this assumption is not supported by the literature on CSOs, it appears to have arisen out of the demands of the striking similarities test, rather than being based on empirical data.

Cases involving alleged serial offenders pose the greatest difficulties for prosecutors because of the multiplicity of victims and the existence of tendency/propensity and coincidence/similar fact evidence. While a judicial decision to accept or reject a defendant's application for separate trials 'is a decision on a matter of procedure',¹⁴⁰ that decision depends on whether the complainants' evidence is cross-admissible in a joint trial as tendency/propensity or coincidence/similar fact evidence. This means the evidence of one complainant must be relevant to and sufficiently probative in relation to the counts involving the other complainant(s) for it to be admitted. The same applies to the evidence of the other complainant(s) in relation to the counts involving the first complainant. A decision that the complainants' evidence is cross-admissible enables all of them to give evidence in a joint trial.

As discussed in Part II, at common law, cross-admissibility is dependent upon satisfaction of the striking similarities test, a test that has had a considerable degree of application under the UEA. The question is whether the striking similarities test (and similar formulations) is the appropriate measure for deciding cross-admissibility and whether or not a joint trial should be held in relation to charges against an alleged serial CSO.

A Striking Similarities at Common Law

The common law has a long history of excluding evidence of a defendant's past criminal conduct in criminal trials. In Australia, exceptions to this general rule were developed mostly in relation to a series of poisoning cases in the late 1800s.¹⁴¹ These cases reflected both the ease with which poisons, such as arsenic and antimony, were available at the time and judges' frustration in relation to the difficulty of proving the act of poisoning by defendants.¹⁴² Previous evidence of a defendant's involvement in a person's death by poisoning became an exception to the rule against admitting evidence of past criminal conduct.

Although the term was not in use at the time when these early cases were decided, evidence of past criminal conduct eventually became known as propen-

¹³⁹ Jill S Levenson and John W Morin, 'Risk Assessment in Child Sexual Abuse Cases' (2006) 85 *Child Welfare* 59, 69.

¹⁴⁰ *Dao v The Queen* (2011) 278 ALR 765, 774 [56] (Spigelman CJ) ('*Dao*').

¹⁴¹ See *R v Makin* (1893) 14 LR (NSW) 1, 4–5 (Rogers QC) (in argument), 22–6 (Windeyer J), 37–8 (Innes J).

¹⁴² See the discussions between counsel and Windeyer J during the Makins' appeal to the Supreme Court of New South Wales, recorded in the court report in *The Sydney Morning Herald* (Sydney), 24 March 1893, 2–3.

sity or similar fact evidence and was only admissible if it met the striking similarities test.¹⁴³

The admissibility of tendency/propensity and similar fact/coincidence evidence is governed either by the common law or statute depending on the jurisdiction.¹⁴⁴ While the terminology of ‘tendency’ and ‘coincidence’ evidence is used under the UEA,¹⁴⁵ it is clear that these words were intended to deal with the type of evidence known as propensity and similar fact evidence at common law.¹⁴⁶ The terms ‘propensity’ and ‘tendency’ evidence refer to ‘[e]vidence of the character, reputation or conduct of a person, or a tendency that a person has or had ... to act in a particular way, or to have a particular state of mind’.¹⁴⁷

The common law term ‘similar fact evidence’ refers to evidence that may, because of the degree of similarity in the evidence of different witnesses, show the identity of the offender or ‘the improbability of coincidence if a number of similar accounts are all true.’¹⁴⁸ The admission of such evidence does not rely on propensity reasoning ‘but on explaining the coincidences between events by [reference to] the perpetrator’s tendency.’¹⁴⁹ Similarly, coincidence evidence is defined under s 98 of the UEA with reference to the similarities in the evidence in question — it refers to two or more events being used to prove the improbability of the events occurring coincidentally, having regard to the similarities of the events and/or the circumstances in which they occurred.

In *Perry v The Queen*,¹⁵⁰ *Sutton v The Queen*¹⁵¹ and *Harriman v The Queen*,¹⁵² the High Court recognised that relevant similar fact and propensity evidence could be admissible but only if its probative value outweighed its prejudicial effect. Similar fact evidence was considered to derive its probative force from

the fact that the evidence reveals ‘striking similarities’, ‘unusual features’, ‘underlying unity’, ‘system’ or ‘pattern’ such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.¹⁵³

¹⁴³ *DPP v Boardman* [1975] AC 421. See also the discussion in Williams and Draganich, above n 9, 24.

¹⁴⁴ The Australian Capital Territory, NSW, Tasmania and Victoria have all adopted UEAs: see above n 10. The common law still applies in the Northern Territory and Queensland (subject to *Evidence Act 1977* (Qld) s 132A). For the admissibility of propensity evidence in Western Australia, see *Evidence Act 1906* (WA) s 31A(2); in South Australia, see *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

¹⁴⁵ UEA ss 97–8.

¹⁴⁶ Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 1, 460–4 [810]–[811], vol 2, 46–7 (draft cls 91–2). The Law Reform Commission’s draft legislation formed the basis for the UEAs. For background on the law relating to propensity and similar fact evidence at the time of the Commission’s report, see at vol 1, 219–21 [400]–[402], vol 2, 222–8 [169]–[171].

¹⁴⁷ UEA s 97(1). This definition is a codification of the common law definition: *ibid*.

¹⁴⁸ *R v Best* [1998] 4 VR 603, 606 (Callaway JA).

¹⁴⁹ Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 178 [3.60].

¹⁵⁰ (1982) 150 CLR 580.

¹⁵¹ (1984) 152 CLR 528.

¹⁵² (1989) 167 CLR 590.

¹⁵³ *Hoch v The Queen* (1988) 165 CLR 292, 294–5 (Mason CJ, Wilson and Gaudron JJ).

In *Pfennig v The Queen* ('*Pfennig*'), Mason CJ, Deane and Dawson JJ emphasised that 'usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics',¹⁵⁴ although their Honours held that these characteristics were not essential prerequisites to admissibility in every case. In *R v Phillips* the High Court, while apparently disclaiming a need for striking similarities,¹⁵⁵ nonetheless held that a strong degree of probative force, in the form of sufficient similarities, was needed to admit the evidence of multiple complainants in a joint sexual assault trial.¹⁵⁶

Both similar fact and propensity evidence can be highly prejudicial to the defendant because of the human tendency to infer guilt from past conduct.¹⁵⁷ In order to prevent the admission of this type of prejudicial evidence, the common law developed the 'no rational view of the evidence' test (also known as the '*Pfennig* test'), which ensures this type of evidence will only be admitted if there is *no* rational view of the evidence that is consistent with the defendant's innocence.¹⁵⁸ However, the focus of this article is on whether or not there is an empirical basis for the application of the striking similarities test for determining the admissibility of multiple complainants' evidence in a joint trial involving child sex offences. This has not been previously discussed in the legal literature,¹⁵⁹ and is analysed in light of the findings from the psychological literature, discussed above, and recent moves in Western Australia ('WA') and the United Kingdom to abolish the test.

The degree of similarity or unity required to give similar fact evidence sufficient probative force is, essentially, a subjective evaluation. As Lord Mackay observed in *Director of Public Prosecutions v P*, the issues of relevance, sufficient probative force and whether it is just to admit the evidence are all 'matters of degree'.¹⁶⁰ This question of degree in a sexual assault trial is made that much easier where the complainants all report very similar offences, a similar modus operandi and similar circumstances in which the offences occurred, because it can then be argued it is improbable that so many complainants would make similar allegations unless they were true.¹⁶¹ Admissibility problems will arise where the circumstances, the offences and the defendant's modus operandi appear to differ in key ways.

Where an alleged offender's sexual behaviour differs in relation to each complainant, lawyers and judges commonly focus on those differences, thus reducing

¹⁵⁴ (1995) 182 CLR 461, 484.

¹⁵⁵ (2006) 225 CLR 303, 322 [58] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

¹⁵⁶ *Ibid* 320–2 [54]–[58] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

¹⁵⁷ See *Pfennig* (1995) 182 CLR 461, 512–13 (McHugh J).

¹⁵⁸ *Sutton v The Queen* (1984) 152 CLR 528, 564 (Dawson J); *Hoch v The Queen* (1988) 165 CLR 292, 296 (Mason CJ, Wilson and Gaudron JJ). This test became known as the *Pfennig* test after it was adopted by a majority of the High Court in *Pfennig* (1995) 182 CLR 461, 482–3 (Mason CJ, Deane and Dawson JJ), 506 (Toohey J). Its ongoing applicability as an exclusionary rule was confirmed in *HML v The Queen* (2008) 235 CLR 334.

¹⁵⁹ See above n 9.

¹⁶⁰ [1991] 2 AC 447, 463.

¹⁶¹ See, eg, the facts in *R v Best* [1998] 4 VR 603 and *R v Papamitrou* (2004) 7 VR 375.

the apparent probative value of the evidence.¹⁶² However, if the striking similarities test is applied without reference to the variety and *lack* of similarity that is typical of CSOs' behaviour, it amounts to no more than judicial guesswork which unwittingly benefits defendants whose behaviour does not meet the test and disadvantages victims whose experiences of sexual abuse are too varied.

From time to time, judges have argued that the striking similarities test should be relaxed in cases where identity is not a fact in issue in a sexual assault trial. In *Director of Public Prosecutions v P*, Lord Mackay observed that

[w]here the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of ... a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.¹⁶³

In England, Lord Mackay's observations constituted a 'reformulation of the "similar fact" evidence test ... [which] was subsequently described by Lord Lloyd ... in *R v H* ... as having released the law from the bondage of "striking similarity"'.¹⁶⁴

The only Australian jurisdiction which has followed the United Kingdom's lead is WA. Along with a package of other reforms, s 31A was inserted into the *Evidence Act 1906* (WA) to deal with the problems associated with admitting propensity evidence in a joint trial of sex offences.¹⁶⁵ Under s 31A(2), where the evidence of multiple complainants is considered to have significant probative value, a balancing test weighs its probative value against the degree of risk of an unfair trial — that is, the test asks whether 'fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial'.¹⁶⁶

It has been accepted that s 31A, together with a provision which allows for joint trials to be held even if the evidence of multiple complainants is not cross-admissible,¹⁶⁷ has 'substantially altered the common law' in WA.¹⁶⁸ Because the WA legislature articulated a particular threshold test of admissibility — that the evidence must have significant probative value — the common law test of 'striking similarities' is no longer a necessary criterion for admissibility.¹⁶⁹

¹⁶² See, eg, the facts in *R v Ford* (2009) 273 ALR 286.

¹⁶³ [1991] 2 AC 447, 462. See also *R v Rajakaruna* (2004) 8 VR 340, 345–6 [13]–[14] (Chernov JA) and his Honour's interpretation of s 398A of the *Crimes Act 1958* (Vic) (now repealed), which was one of the first reforms governing the admissibility of propensity evidence at common law.

¹⁶⁴ *Donaldson v Western Australia* (2005) 31 WAR 122, 147 [123] (Roberts-Smith JA) ('*Donaldson*'), citing *R v H* [1995] 2 AC 596, 626.

¹⁶⁵ *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* (WA) s 13, which commenced on 1 January 2005.

¹⁶⁶ The balancing test stated in s 31A(2)(b) is based on the wording suggested by McHugh J in his dissenting judgment in *Pfennig* (1995) 182 CLR 461, 528.

¹⁶⁷ *Criminal Procedure Act 2004* (WA) s 133(5)(c)(ii).

¹⁶⁸ *Dair v Western Australia* (2008) 36 WAR 413, 428 [59] (Steytler P).

¹⁶⁹ See *ibid* 472 [267] (Heenan AJA).

While the WA Court of Appeal has held that the word ‘significant’ has the same meaning as that given to the word under the UEA,¹⁷⁰ the Court has accepted, in several child sexual assault cases, that propensity evidence about a defendant can have significant probative value *without* there being a need to show striking similarities or sexual interference by the defendant in a particular way.¹⁷¹ If the evidence in question reveals an underlying unity, system or pattern, that will be sufficient to establish that the evidence has significant probative value under s 31A(2), ‘irrespective of what physical acts [were] individually involved’¹⁷² and even if the sexual conduct of the defendant was alleged to have occurred ‘in a variety of ways and at various times and places.’¹⁷³

B *Striking Similarities under the UEA*

Despite the fact that the UEA contains its own formulations under pt 3.6 for the admission of tendency and coincidence evidence,¹⁷⁴ the striking similarities test is still a test of common currency under the UEA in contrast to the situation in WA. Once the relevance test under s 55 is satisfied, tendency or coincidence evidence adduced by the prosecution is subject to a two-stage scheme for its admission under the exclusionary rules contained in pt 3.6:

- 1 a ‘significant probative value’ test under ss 97(1)(b) and 98(1)(b); and
- 2 a balancing test under s 101(2) which requires the probative value of the tendency or coincidence evidence to substantially outweigh its prejudicial effect.

The words ‘significant probative value’ create a second test of relevance¹⁷⁵ since ‘[t]he question of probative value is a question of relevance’.¹⁷⁶ The assessment involves asking whether ‘the evidence is capable, to a significant degree, of rationally affecting the assessment ... of the probability of the

¹⁷⁰ See *ibid* 428–9 [60]–[61] (Steytler P), [175] (Miller JA); *Mansell v Western Australia* [2009] WASCA 140 (21 July 2009) [37] (Miller JA, Martin CJ and Buss JA agreeing). For the meaning of ‘significant’ under the UEA, see below Part IV(B).

¹⁷¹ *Donaldson* (2005) 31 WAR 122, 152 [149] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing); *VIM v Western Australia* (2005) 31 WAR 1; *Di Lena v Western Australia* (2006) 165 A Crim R 482; *Dair v Western Australia* (2008) 36 WAR 413; *PIM v Western Australia* (2009) 40 WAR 489; *Upton v Western Australia* [2008] WASCA 54 (7 March 2008); *AJ v Western Australia* (2007) 177 A Crim R 247.

¹⁷² *Donaldson* (2005) 31 WAR 122, 152 [149] (Roberts-Smith JA).

¹⁷³ *Ibid* 139 [87] (Roberts-Smith JA), quoting the trial judge.

¹⁷⁴ See the amendments to ss 97 and 98 (*Evidence Amendment Act 2007* (NSW) sch 1 items 38–9; *Evidence Amendment Act 2008* (Cth) sch 1 items 42–3; *Evidence Amendment Act 2010* (Tas) ss 28–9). The amended ss 97 and 98 were included in the *Evidence Act 2008* (Vic) as enacted. Part 3.6 only regulates evidence that is led for a tendency or coincidence *purpose*, and is intended to replace the common law rules relating to propensity evidence: *R v Martin* [2000] NSWCCA 332 (25 August 2000) [59] (Ireland JA).

¹⁷⁵ In *R v Lockyer* (1996) 89 A Crim R 457, 459, Hunt CJ at CL held that “‘significant’ probative value must mean something more than mere relevance but something less than a “substantial” degree of relevance.”

¹⁷⁶ *Dao* (2011) 278 ALR 765, 783 [98] (Allsop P). See also *R v Fletcher* (2005) 156 A Crim R 308, 319 [49] (Simpson J).

existence of a fact in issue.¹⁷⁷ This is a subjective judgment or evaluation,¹⁷⁸ as can be seen from the wording in ss 97(1)(b) and 98(1)(b), which refer to whether ‘*the court thinks* that the evidence will ... have significant probative value’ (emphasis added). As the former Chief Justice of NSW observed, the presence of the words ‘the court thinks’ ‘introduce[s] an element of subjectivity’.¹⁷⁹ In fact, a majority of the NSW Court of Criminal Appeal (‘NSWCCA’) has held that the approach under ss 97(1)(b) and 98(1)(b) is involves ‘a degree and value judgment’¹⁸⁰ which will vary from case to case because of the requirement that a trial judge must have regard to any other evidence adduced by the prosecution.¹⁸¹ For example, where there is no forensic or eyewitness evidence, tendency evidence that shows a defendant has engaged in sexual conduct with another child is likely to be ‘significant’ (ie ‘important’ or ‘of consequence’)¹⁸² in establishing whether or not the accused committed the sexual conduct complained of.¹⁸³ But because a judge’s interpretation of the word ‘significant’ will be subjective, the word’s application will depend on a trial judge’s knowledge and assumptions about the behaviour of CSOs.

In relation to the second stage of admissibility, the balancing test under s 101(2) is a less stringent rule of exclusion than the common law *Pfennig* test.¹⁸⁴ Section 101(2) does not assume that tendency or coincidence evidence will automatically have a prejudicial effect, because the section refers to ‘any prejudicial effect it *may* have on the defendant’ (emphasis added). The balancing test also involves a degree and value judgment since, as a test directed towards the exclusion of evidence, it is ‘quintessentially a judgment ... as to the probative value of the evidence relative to any potential prejudicial effect’¹⁸⁵ — in particular, a value judgment as to whether the jury ‘may make some improper use’ of the evidence.¹⁸⁶ Thus, it is appropriate at this stage for a judge to consider ‘the utility of, and protection afforded by, directions that may be necessary or available as the evidence is given or in summing up’¹⁸⁷ as a way of ameliorating the likely prejudicial effect.¹⁸⁸

¹⁷⁷ *Dao* (2011) 278 ALR 765, 798 [184] (Simpson J).

¹⁷⁸ *Ibid* 783 [98] (Allsop P).

¹⁷⁹ *Ibid* 770 [27] (Spigelman CJ). See also *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569, 586 [74] (Sackville J).

¹⁸⁰ *R v Fletcher* (2005) 156 A Crim R 308, 317 [36] (Simpson J, McClellan CJ at CL agreeing), quoting *Fleming v Hutchinson* (1991) 66 ALJR 211. Cf *R v Ford* (2009) 273 ALR 286, 313 [101] (Campbell JA).

¹⁸¹ UEA ss 97(1)(b), 98(1)(b).

¹⁸² *R v Lockyer* (1996) 89 A Crim R 457, 459 (Hunt CJ at CL).

¹⁸³ See *R v GAC* (2007) 178 A Crim R 408; *AW v The Queen* [2009] NSWCCA 1 (30 January 2009).

¹⁸⁴ See *R v Ellis* (2003) 58 NSWLR 700, 717 [88]–[89] (Spigelman CJ, Sully, O’Keefe, Hidden and Buddin JJ agreeing). According to *R v RN* [2005] NSWCCA 413 (2 December 2005) [11] (Sully J, Grove and Howie JJ agreeing), the essence of the balancing process under s 101(2) was described by McHugh J in *Pfennig* (1995) 182 CLR 461, 528–9.

¹⁸⁵ *Dao* (2011) 278 ALR 765, 796 [171] (Simpson J).

¹⁸⁶ *R v Fletcher* (2005) 156 A Crim R 308, 319 [48] (Simpson J).

¹⁸⁷ *Dao* (2011) 278 ALR 765, 784 [104] (Allsop P).

¹⁸⁸ *Ibid* 796 [172] (Simpson J). There is a growing judicial view that tendency or coincidence evidence is not likely to be as prejudicial as is claimed since juries are capable of making rational decisions if properly instructed as to the use to which the evidence can be put, and if warned

1 Tendency Evidence under the UEA: The Role of the Striking Similarities Test

Section 97 does not contain any references to the need for similarities in particular evidence for that evidence to be admissible to prove a relevant tendency. Nonetheless, the case law shows that the significant probative value test under s 97(1)(b) will be satisfied if there are striking similarities in the evidence of two or more complainants,¹⁸⁹ or if that evidence reveals a similar pattern of behaviour on the part of the accused.¹⁹⁰ This is despite the fact that in *R v Ellis*, Spigelman CJ observed there were at least eight indications in pt 3.6 of the UEA that Parliament ‘intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable.’¹⁹¹

Tendency evidence ‘may be strong or weak, depending upon the nature of the evidence’, but the probative value ‘must not be so weak as to be bereft of “significance”’.¹⁹² While ‘[t]he level of generality of the evidence may affect’ its significance,¹⁹³ concepts such as generality and significance inevitably involve subjective judgments. It is not the fault of trial judges that they may not understand the significance of the totality of an alleged serial offender’s behaviour or his different behaviour on different occasions with different victims. Yet engagement with the psychological literature is necessary if a trial judge’s assessment of offender behaviour is to bear any relationship to reality.

The striking similarities test has been applied in several cases under the UEA when assessing whether the evidence of multiple complainants was sufficiently similar to have significant probative value. Appeal cases show that this test is regularly argued in submissions by prosecutors and defence counsel and often applied by trial judges and appeal judges to admit or exclude evidence under ss 97 and 98.¹⁹⁴ In some cases, the Crown has expressly disclaimed reliance on striking similarities, instead basing its argument for admissibility on the fact that the tendency or coincidence evidence establishes a pattern of behaviour or

about impermissible forms of reasoning: see *R v PWD* (2010) 205 A Crim R 75, 92 [90] (Beazley JA, Buddin J and Barr AJ agreeing); *R v Ford* (2009) 273 ALR 286, 319 [139]–[140] (Campbell JA); *Donaldson* (2005) 31 WAR 122, 141–2 [95]–[99] (Roberts-Smith JA).

¹⁸⁹ *CGL v DPP (Vic)* (2010) 24 VR 486, 497 [38]–[40] (Maxwell P, Buchanan and Bongiorno JJA).

¹⁹⁰ *Dao* (2011) 278 ALR 765, 794–5 [162]–[165], 801 [204] (Simpson J).

¹⁹¹ (2003) 58 NSWLR 700, 716–17 [74]–[84]. Although this observation was made in relation to whether the *Pfennig* test should be incorporated into s 101(2) of the UEA, the case stands for the broader proposition that the UEA was ‘intended to operate in accordance with its own terms’, not the common law: at 717 [78].

¹⁹² *Dao* (2011) 278 ALR 765, 797 [180] (Simpson J).

¹⁹³ *Ibid.*

¹⁹⁴ *R v F* [2002] NSWCCA 125 (9 April 2002); *R v WRC* (2002) 130 A Crim R 89; *R v Milton* [2004] NSWCCA 195 (18 June 2004); *R v Harker* [2004] NSWCCA 427 (2 December 2004); *R v Barton* [2004] NSWCCA 229 (8 July 2004); *R v Fletcher* (2005) 156 A Crim R 308; *R v GAC* (2007) 178 A Crim R 408; *KJR v The Queen* (2007) 173 A Crim R 226; *R v Smith* (2008) A Crim R 8; *AE v The Queen* [2008] NSWCCA 52 (20 March 2008); *LJW v The Queen* [2010] NSWCCA 114 (4 June 2010); *PNJ v DPP (Vic)* (2010) 27 VR 146; *NAM v The Queen* [2010] VSCA 95 (22 April 2010); *DPP (Vic) v BCR* [2010] VSCA 229 (9 September 2010); *CGL v DPP (Vic)* (2010) 24 VR 486; *KRI v The Queen* (2011) 207 A Crim R 552; *MR v The Queen* [2011] VSCA 39 (18 February 2011). The test has also been applied in adult sexual assault trials under the UEA: see, eg, *R v Ford* (2009) 273 ALR 286.

modus operandi on the part of the accused.¹⁹⁵ However, in order to show such a pattern or a modus operandi it is necessary to identify similarities in the accused's behaviour¹⁹⁶ — meaning that an approach that is in substance the same as striking similarities is being applied.

Because the striking similarities test has been the focus for considering the admissibility of evidence under s 97, it is necessary to analyse the validity of this approach when considering the sexual conduct of an alleged serial CSO. In *CGL v Director of Public Prosecutions (Vic)* ('CGL'), the Victorian Court of Appeal ('VSCA') remarked that

[w]hen s 97(1) speaks of a tendency 'to act in a particular way', we hardly think that Parliament had in mind a tendency which would be expressed as generally as 'a tendency to act upon sexual attraction to young girls aged between eight and 13 years'.¹⁹⁷

Therefore, the question is: how general or specific should the sexual conduct of an alleged CSO be before it is accepted that the CSO's behaviour amounts to 'acting in a particular way'?

In *R v Barton* ('Barton'),¹⁹⁸ the NSWCCA upheld the accused's appeal against his conviction in a case where the trial judge had found the evidence of seven adolescent inmates of a juvenile detention centre cross-admissible in a joint trial. This was despite the apparent lack of striking similarities in the accused's sexual behaviour, which ranged from minor sexual behaviour such as voyeurism and sexual touching to masturbation, fellatio and intercourse. Grove J (Dunford J and Kirby J agreeing) criticised the trial judge's decision because of his failure to discriminate between the less serious and more serious sexual behaviour, since '[b]etween the two assemblages of ... conduct, there was no discernible pattern or "signature"'.¹⁹⁹ For this reason, the less serious behaviour was not considered probative in relation to the occurrence of the more serious behaviour. In light of the literature on the extent and variety of CSOs' behaviour, it is clear that Grove J was making a subjective judgment that may have been logical from a legal standpoint focused on similarities but not from a scientific perspective focused on whether an offender is a repeat offender.

In *R v Fletcher* ('Fletcher'),²⁰⁰ a case concerning a priest who had been charged with nine counts of child sexual assault, the NSWCCA condoned the trial judge's decision to exclude the evidence of all but one of eight witnesses because of lack of similarities with the complainant's evidence. Where there are

¹⁹⁵ See, eg, *Dao* (2011) 278 ALR 765, 793 [158] (Simpson J); *R v PWD* (2010) 205 A Crim R 75, 82 [35] (Beazley JA).

¹⁹⁶ In *Dao* (2011) 278 ALR 765, 793 [158] (Simpson J), the Crown identified 10 common features in the accused's behaviour with the three complainants in order to show a pattern of behaviour. This approach was remarkably similar to the long list of features identified by the Crown in relation to the accused's sexual behaviour in *R v Ford* (2009) 273 ALR 286, 293–5 [28]–[29] (Campbell JA), where the Crown had, instead, argued 'striking similarities'.

¹⁹⁷ (2010) 24 VR 486, 497 [39] (Maxwell P, Buchanan and Bongiorno JJA).

¹⁹⁸ [2004] NSWCCA 229 (8 July 2004).

¹⁹⁹ *Ibid* [14].

²⁰⁰ (2005) 156 A Crim R 308.

no striking similarities, Simpson J cautioned against concluding that ‘evidence of a tendency to sexual misconduct with adolescent boys could rationally affect the assessment of the probability that the [the defendant] sexually miscondacted himself with the complainant as an adolescent.’²⁰¹ Yet in studies going back at least 15 years, the psychological literature has found that evidence of prior sexual behaviour with a child is the best predictor as to whether a person will commit another child sex offence.

Simpson J also appeared to have had little understanding of the purpose of an offender’s grooming behaviour in testing a child’s reaction to non-sexual touching, and the way this behaviour can lead to more serious sexual behaviour involving genital contact.²⁰² There was also a failure to acknowledge the evidentiary significance of the defendant’s sexual games and interactions with male adolescents, as indicated by Simpson J’s warning:

While it may be tempting to think ... that evidence of a sexual attraction to male adolescents has probative value ... an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. ... [T]here will be cases where the similarities are of so little moment as to render the evidence probative of nothing.²⁰³

In both *Barton* and *Fletcher*, the NSWCCA adopted the common law approach²⁰⁴ by focusing on whether or not the sexual practices of the defendant with the complainant were sufficiently similar to his sexual practices with another complainant/witness to allow the evidence of those witnesses to be considered admissible.

More recently, however, there has been a discernible shift in the NSWCCA’s approach to tendency evidence in child sexual assault trials. In *Dao*,²⁰⁵ the defendant, a priest, had been accused of sexually abusing six adolescent boys. The trial judge ordered that the counts in respect of three complainants be separated, but permitted a joint trial for the counts in respect of the remaining three complainants (SM, JC and MB). The trial judge held that the evidence of the former three complainants was not cross-admissible in the joint trial, on the grounds that the defendant’s ‘opportunistic’²⁰⁶ sexual conduct in relation to the first three boys lacked the planning, grooming and special attention that characterised the alleged sexual conduct involving SM, JC and MB.

On appeal, Simpson J recognised that ‘[e]vidence of a tendency may cast light on the conduct or state of mind of a person without being evidence of conduct of

²⁰¹ Ibid 319 [49].

²⁰² L Berliner and J R Conte, ‘The Process of Victimization: The Victims’ Perspective’ (1990) 14 *Child Abuse & Neglect* 29; P Phelan, ‘Incest and Its Meaning: The Perspectives of Fathers and Daughters’ (1995) 19 *Child Abuse & Neglect* 7.

²⁰³ *Fletcher* (2005) 156 A Crim R 308, 319–20 [50].

²⁰⁴ See, eg, *R v Rajakaruna* (2004) 8 VR 340; *R v KP; Ex parte A-G (Qld)* [2006] QCA 301 (22 August 2006); *R v Ford* [2006] QCA 142 (5 May 2006); *R v BBG* (2007) 174 A Crim R 86; *Phillips v The Queen* (2006) 225 CLR 303.

²⁰⁵ (2011) 278 ALR 765.

²⁰⁶ Ibid 794 [161] (Simpson J).

the same kind',²⁰⁷ although her Honour still held that similarity in conduct was relevant to the assessment of significant probative value under s 97(1)(b).²⁰⁸ Contrary to her views in *Fletcher*, however, Simpson J observed that '[i]t could scarcely be contested that evidence that showed that the applicant had a sexual interest in, and attraction to, adolescent boys had probative value in respect of an allegation that he had sexually abused another adolescent boy.'²⁰⁹

This more realistic approach to the admissibility of tendency evidence was also evident in the NSWCCA's decision in *R v PWD* ('*PWD*').²¹⁰ In that case, four male students at a private school had accused the principal of various forms of sexual misconduct. This behaviour did not exhibit the high degree of similarity that the NSWCCA said was required in *Barton* and *Fletcher* since it ranged from minor sexual touching and fondling to masturbation and oral sex.

The trial judge refused to admit the evidence of the four complainants and two other witnesses as tendency evidence because of the lack of similarities in the alleged sexual conduct. With apparently little knowledge about the grooming and sexual behaviours of CSOs, it was easy for the trial judge to argue that tendency evidence given by three complainants 'did not make it "more likely to a significant extent" that the charged acts occurred'.²¹¹ In an appeal by the Crown, the NSWCCA held that the trial judge had erred in making the lack of similarity between the accused's sexual acts with different boys the determining factor in assessing the probative value of the evidence.²¹²

Simpson J observed in *Dao* that '*Barton* and *PWD* are illustrative of the divergence of facts and circumstances that will inevitably result in different outcomes without any misapplication of principle.'²¹³ This analysis is not terribly satisfactory where the principle is based on subjective assessments about the similarities or non-similarities in the conduct of alleged CSOs. Both *Barton* and *PWD* involved a range of sexual misconduct, as well as differences in the gravity of the offences alleged; yet in *Barton* the complainants' evidence was not cross-admissible. While the sexual misconduct in *PWD* was very similar to that in *Barton* in terms of its variety, the evidence of the three complainants in *PWD* was held to be cross-admissible on appeal.

More recently, in *Dao's* case, Simpson J (Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreeing) concluded that '[e]vidence of more serious [sexual] conduct may support allegations of less serious [sexual] conduct just as evidence of less serious [sexual] conduct may support allegations of more serious [sexual] conduct', despite the wide variety in *Dao's* sexual behaviour.²¹⁴ These views from a bench of five of the NSWCCA is a welcome development, although the

²⁰⁷ Ibid 797 [181].

²⁰⁸ Ibid.

²⁰⁹ Ibid 798 [187].

²¹⁰ (2010) 205 A Crim R 75.

²¹¹ Ibid 78 [6] (Beazley JA), quoting the trial judge.

²¹² Ibid 92 [86]–[88] (Beazley JA, Buddin J and Barr AJ agreeing).

²¹³ *Dao* (2011) 278 ALR 765, 800 [197].

²¹⁴ Ibid 800 [201].

recognition that each case will depend on its own facts²¹⁵ means that subjectivity rather than informed knowledge of CSO behaviour is likely to prevail at both trial and appeal levels.

In fact, no consistency of approach can be identified in the many appeal cases heard in NSW; nor is there any guarantee that in future cases the striking similarities test will not be applied, given the frequency with which counsel rely on it and the frequency with which trial judges still apply it.

In Victoria, a similar lack of consistency is evident in trial and appeal judges' approaches to the need, or otherwise, for striking similarities in the evidence adduced in a joint trial of child sex offences. What is evident in the appeals being heard under the *Evidence Act 2008* (Vic) is frequent reliance on the common law striking similarities test.

In *MR v The Queen*, the trial judge held that any requirement of similarity in the sexual activity of the accused was met by the fact that each count against the accused 'involved sexual activity involving his young daughter.'²¹⁶ Thus, the trial judge focused on whether or not there was evidence of sexual conduct generally speaking, rather than evidence of specific types of sexual activity by the accused. While the trial judge's approach was upheld on appeal, the VSCA was careful to note that a degree of similarity may still be required in order to identify the 'relevant tendency' of an accused and 'to sustain admissibility under s 97' where there are several counts involving *multiple* complainants and where cross-admissibility is at issue.²¹⁷

In *Director of Public Prosecutions (Vic) v BCR* ('BCR'), the trial judge had distinguished between three types of the accused's alleged conduct with different complainants: 'indecent touching while comforting students who had been injured playing sport, ... alleged touching after punishment of students and touching after comforting students who had not been injured'.²¹⁸ Because not all the evidence contained 'the distinctive feature of "comforting after injury"',²¹⁹ the trial judge concluded that there was 'an insufficient identifiable pattern of similarities in the circumstances of the offending "to make out a tendency[?]"'.²²⁰

On appeal, the Crown argued that the trial judge had incorrectly applied the principles from three previous cases — *NAM v The Queen* ('NAM'),²²¹ *PNJ v Director of Public Prosecutions (Vic)* ('PNJ')²²² and *CGL*²²³ — in deciding that evidence from two or more complainants had to have distinctive or unusual features to be cross-admissible, and that these Victorian authorities were incon-

²¹⁵ Ibid.

²¹⁶ [2011] VSCA 39 (18 February 2011) [7] (Hansen JA).

²¹⁷ Ibid [12] (Hansen JA, Buchanan and Harper JJA agreeing).

²¹⁸ [2010] VSCA 229 (9 September 2010) [21] (Neave and Weinberg JJA and T Forrest AJA).

²¹⁹ Ibid.

²²⁰ Ibid [22], quoting the trial judge.

²²¹ [2010] VSCA 95 (22 April 2010).

²²² (2010) 27 VR 146.

²²³ (2010) 24 VR 486.

sistent with recent NSW authority.²²⁴ The Crown argued that nothing in s 97 of the UEA ‘warrants the importation of a requirement that there be something “distinctive” about the evidence’ before it can have significant probative value.²²⁵ While the Crown accepted there had to be some degree of similarity in the accused’s alleged conduct to enable a tendency to be identified, that need not be a ‘striking’, ‘distinctive’, ‘remarkable’ or ‘unusual’ similarity.²²⁶

The VSCA refused to be drawn on the Crown’s submission that the decisions in *NAM*, *PNJ* and *CGL* were ‘plainly wrong’, because an interlocutory appeal was not ‘an appropriate vehicle for challenging an existing line of authority [except] in exceptional circumstances.’²²⁷ This means that on current authority in Victoria, if the evidence of multiple complainants is to be cross-admissible in a child sexual assault trial, it must exhibit some distinctive behaviour on the part of the accused in order to link him with each complainant. Yet Smallbone and Wortley’s study showed that extra-familial offenders, engage in a variety of strategies to gain access to their victims,²²⁸ so that differentiating between sexual abuse while comforting and not comforting students — as the trial judge did in *BCR* — is largely irrelevant to whether or not a particular offender has a tendency to engage in the sexual abuse of teenage boys.

Indeed, *NAM*, *PNJ* and *CGL* are inconsistent with the recent progressive approach taken by the NSWCCA in relation to the cross-admissibility of the evidence of two or more complainants. But does it matter that the Victorian line of authority represented by *NAM*, *PNJ* and *CGL* concerned s 98, rather than s 97, of the UEA?

2 *Coincidence Evidence under the UEA: The Role of the Striking Similarities Test*

While the NSWCCA recently decided that ‘for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour’,²²⁹ the admissibility of coincidence evidence under s 98 *is* based on finding similarities in two or more events, in the circumstances in which they occurred, or in both the events and the circumstances. If there are such similarities, the next question is whether they are ‘such that it is improbable that the events occurred coincidentally’.²³⁰ If the answer is yes, only then can the events be used to prove that the accused did a certain act (such as sexual abuse) or had a certain state of mind (such as sexual attraction). Like the approach at common law, coincidence or improbability reasoning is used where there are features of the accused’s sexual behaviour with multiple complainants that are strikingly similar or where the circumstances in which the behaviour occurred are such that

²²⁴ *BCR* [2010] VSCA 229 (9 September 2010) [26]–[27] (Neave and Weinberg JJA and T Forrest AJA).

²²⁵ *Ibid* [28], quoting the Crown’s written outline of argument.

²²⁶ *Ibid*.

²²⁷ *Ibid* [44].

²²⁸ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, 51–4.

²²⁹ *PWD* (2010) 205 A Crim R 75, 91 [79] (Beazley JA, Buddin J and Barr AJ agreeing).

²³⁰ *CGL* (2010) 24 VR 486, 493 [22] (Maxwell P, Buchanan and Bongiorno JJA).

coincidence can be eliminated as a reasonable explanation. But what *degree* of similarity in the sexual conduct of the accused (the events) *or* in the circumstances in which the alleged sexual abuse occurred is required?

As a result of the inquiry into the operation of the UEA in 2005,²³¹ s 98 was amended to eliminate a drafting anomaly which had meant that *dissimilar* evidence was admissible to prove a lack of coincidence.²³² What degree of similarity will be required under the new s 98, in the events or the circumstances or both, will differ from case to case, although case law on the former s 98 stated that, for the events to be related, they had to be ‘substantially and relevantly similar, and that the circumstances in which they occurred were [required to be] substantially similar’.²³³ The requirement that the events be ‘related’ reflected the requirement of ‘striking similarities’ for the admission of similar fact evidence at common law. The definition of ‘related events’ in the former s 98

ha[d] the effect that the intended controls on admissibility [would] only apply if the events and circumstances in which the events occurred [were] substantially similar. Paradoxically, therefore, there [was] a test of admissibility for ‘related events’ ... but not a test for unrelated events. As a result, [the former] s 98 [did] not apply to exclude evidence where the events [were] not substantially and relevantly similar ... [and] the other intended control, s 101, [had] no application.²³⁴

Presumably, therefore, a wider interpretation of the amended s 98 will be required. This will ensure that the provision applies to the type of evidence that the former s 98 did not by capturing evidence that does not have a high degree of similarity as required by the common law ‘striking similarities’ test. According to the Australian Law Reform Commission (‘ALRC’), the NSW Law Reform Commission (‘NSWLRC’) and the Victorian Law Reform Commission (‘VLRC’), although the amended s 98 requires

consideration of similarities in events and circumstances, it does not require ... that there be similarities in both the events and circumstances and that the similarities be striking. ...

The Commissions’ view is that to require both a striking similarity of events and a striking similarity of circumstances would be to raise the threshold too high and would be likely to exclude highly probative evidence. For example, highly probative evidence of unusual, similar acts occurring in different circumstances would be excluded.²³⁵

²³¹ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2005) (‘*Uniform Evidence Law*’).

²³² *Ibid* 370 [11.19].

²³³ *R v F* [2002] NSWCCA 125 (9 April 2002) [26] (Wood CJ at CL, Meagher JA and Bell J agreeing), quoting *Evidence Act 1995* (NSW) s 98(2), as repealed by *Evidence Amendment Act 2007* (NSW) sch 1 item 39.

²³⁴ *Uniform Evidence Law*, above n 231, 370 [11.19] (citations omitted).

²³⁵ *Ibid* 371–2 [11.22], 372 [11.24]. These observations were made in relation to the Commissions’ proposed replacement for the former s 98, a proposal which was adopted by the UEA legislatures: see, eg, Explanatory Memorandum, Evidence Amendment Bill 2008 (Cth) 19 [120].

In recent VSCA cases which have applied s 98, however, a high degree of similarity has been required, with no reference being made to the reasons why s 98 was amended or the fact that the greater the degree of similarity required in the events and circumstances, the less likely it will be that s 98 will capture *dissimilar* evidence.²³⁶ According to the VSCA's approach, the more there are apparent dissimilarities in the evidence of multiple complainants, the less likely their evidence, as a whole, will be considered to have significant probative value on the basis that it disproves coincidence.

The interpretation of s 98 by the VSCA has been based on the approach taken under the former s 398A of the *Crimes Act 1958* (Vic)²³⁷ and in common law cases.²³⁸ While the VSCA has said it is unnecessary to demonstrate *striking* similarities, since what is required is an underlying unity, a common *modus operandi* or a pattern of conduct,²³⁹ the Court has also expressed the contradictory view that 'it is the *distinctiveness* of the act which provides the requisite degree of similarity.'²⁴⁰ The VSCA has also noted that 'factors which [are] to be considered in determining whether ... tendency evidence [has] significant probative value [are] also relevant in determining whether the evidence [has] significant probative value' as coincidence evidence.²⁴¹

This requirement of distinctiveness meant that in *CGL* the alleged conduct of the accused in rubbing the genitals of two young girls was 'so non-specific ... as to reveal nothing distinctive about any particular alleged act'²⁴² and occurred in 'unremarkable circumstances that are common to sexual offences against children'.²⁴³ The apparent lack of relevant similarity which rendered the complainants' evidence inadmissible as coincidence evidence also meant their evidence was inadmissible as tendency evidence.²⁴⁴ In fact, the VSCA proposed the general proposition that

the greater the degree of specificity with which the similarities can be identified, the more likely it is that the evidence will be probative of a tendency to act in a *distinctive* way or to do acts of a *distinctive* kind. Conversely, the greater the degree of generality, the more difficult it will be to demonstrate that the evidence in question has 'significant' probative value and ... to demonstrate

²³⁶ *NAM* [2010] VSCA 95 (22 April 2010); *PNJ* (2010) 27 VR 146; *CGL* (2010) 24 VR 486.

²³⁷ *CGL* (2010) 24 VR 486, 494–5 [28]–[29] (Maxwell P, Buchanan and Bongiorno JJA). Section 398A was repealed by s 42 of the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009* (Vic). It specified the following test for the admissibility of propensity evidence: 'that in all the circumstances it is just to admit the evidence despite any prejudicial effect it may have on the person charged with the offence'.

²³⁸ *PNJ* (2010) 27 VR 146, 149 [10]–[12] (Maxwell P, Buchanan and Bongiorno JJA).

²³⁹ *CGL* (2010) 24 VR 486, 494–5 [28]–[30] (Maxwell P, Buchanan and Bongiorno JJA).

²⁴⁰ *NAM* [2010] VSCA 95 (22 April 2010) [13] (Maxwell P, Buchanan and Nettle JJA agreeing) (emphasis added).

²⁴¹ *BCR* [2010] VSCA 229 (9 September 2010) [24] (Neave and Weinberg JJA and T Forrest AJA).

²⁴² *CGL* (2010) 24 VR 486, 495 [31] (Maxwell P, Buchanan and Bongiorno JJA).

²⁴³ *Ibid*, quoting *AE v The Queen* [2008] NSWCCA 52 (20 March 2008) [42] (Bell JA, Hulme and Latham JJ).

²⁴⁴ *CGL* (2010) 24 VR 486, 497 [38]–[39] (Maxwell P, Buchanan and Bongiorno JJA).

that its probative value ‘substantially outweighs’ the very real prejudicial effect of evidence of this kind.²⁴⁵

A similar approach was taken by the VSCA in *PNJ*. This case involved a youth officer in a youth training centre who had been charged with 14 counts of sexual assault, ranging from indecent assault to penetration, against resident teenage boys. The accused had argued ‘that the events relied on by the prosecution lacked “any meaningful similarity”’.²⁴⁶ The VSCA in *PNJ* went one step further than the Court in *CGL* by stating it was ‘a mistake to treat as relevant similarities ... features of the alleged offending which reflect circumstances outside the accused’s control’ since these reflected the setting in which the offending occurred.²⁴⁷ The Court held that ‘[t]o qualify as a relevant similarity in [these] circumstances ... there must be something distinctive about the way in which the accused allegedly took advantage of the setting’.²⁴⁸ Thus, no similarities could be drawn from the complainants’ ages since that was the age range for detention at the youth centre, nor could similarities be drawn from the location of the alleged offending (the complainants’ or the defendant’s bedrooms) since that merely reflected the custodial setting;²⁴⁹ the defendant had *no choice* in the setting or locations that were common to each complainant. Although each complainant complained of similar sexual acts (masturbation and oral sex), the VSCA considered these to be ‘unremarkable’ and nothing more than common types of sexual behaviour which could not ‘distinguish the applicant’s offending from that of any other such offender’.²⁵⁰

However, the purpose of s 98 is not to distinguish one sex offender from another. Where a joint trial is being sought by the prosecution, the role of s 98 is to decide on the cross-admissibility of the complainants’ evidence. To take an approach which requires distinctive patterns of sexual behaviour on the part of the accused narrows the scope of the amendments to s 98, contrary to the intentions of the ALRC, NSWLRC and VLRC when they recommended those amendments. The narrow approach of the VSCA also constitutes a major impediment to the successful prosecution of ‘unremarkable’ sexual abuse and for victims who through no fault of their own happen to have been sexually abused in ‘commonplace’ or ‘unremarkable’ ways. The approach also fails to recognise the type of offender who seeks victims through his paid or unpaid work²⁵¹ or

²⁴⁵ Ibid [40]. See also *GBF v The Queen* [2010] VSCA 135 (7 June 2010) [26] (Nettle and Harper JJA and Hansen AJA), where the VSCA held that evidence of the mere fact that an accused had a sexual interest in one complainant was not probative of whether he had committed a sexual offence against another child.

²⁴⁶ (2010) 27 VR 146, 150 [17] (Maxwell P, Buchanan and Bongiorno JJA).

²⁴⁷ Ibid 151 [19].

²⁴⁸ Ibid 151 [20].

²⁴⁹ Ibid 151 [19].

²⁵⁰ Ibid 151 [22]. Contra *RHB v The Queen* [2011] VSCA 295 (27 September 2011), where the VSCA declined to follow the reasoning in *PNJ*. Nettle JA (Harper JA agreeing) of the VSCA stated that he was ‘not sure that *PNJ* was correctly decided’ and distinguished the case because it dealt with coincidence evidence, not the tendency evidence admitted in *RHB*: at [17].

²⁵¹ See Matthew Colton and Maurice Vanstone, *Betrayal of Trust: Sexual Abuse by Men Who Work with Children ... In Their Own Words* (Free Association Books, 1996); Benoit Leclerc, Jean

who uses his employment to gain access to children. In their self-report study, Smallbone and Wortley reported that while only 1.2 per cent of offenders joined an organisation 'for the purpose of locating victims', 19.7 per cent of offenders took advantage of the employment situation they found themselves in.²⁵² For these types of offenders, control over the setting of the alleged abuse is irrelevant to whether or not sexual abuse has occurred since the pattern of behaviour is the selection of children in an employment situation to whom the offender is sexually attracted.

The VSCA's approach in *CGL* and *PNJ* also contradicts the view of a majority of the NSWCCA that in some cases

the probative value of the coincidence evidence arises not merely from the ... events, but also, and especially, from the circumstance that two or more persons independently give evidence of the ... events, where it is improbable that they would have given accounts with such similarity unless both or all accounts had foundation in fact. In such cases, ... the ... events need not necessarily have such striking similarity as is required where it is only the events themselves that are said to have probative value.²⁵³

This suggests that in a situation where the setting is outside the control of the victim and the apparent control of the offender, the fact that several children give accounts of sexual abuse by the same offender, whether the acts of sexual abuse are commonplace or distinctive, means that their evidence can be used to prove the improbability of the abuse occurring coincidentally.

Nonetheless, the narrow approach in *PNJ* has been adopted in subsequent VSCA cases,²⁵⁴ including *NAM*²⁵⁵ where most of the sexual acts of the accused were described as 'commonplace' except those where two complainants gave almost identical accounts about the accused's use of a banana. What these cases show is that many acts of child sexual abuse are now regarded as 'commonplace' and 'unremarkable' by the VSCA, illustrating the 'straightjacket' represented by the striking similarities test which has led the VSCA on a search for distinctive sexual acts and distinctive circumstances. Worryingly, it seems that strange and unusual sexual acts will be required for multiple complainants' evidence to be cross-admissible as coincidence evidence. This demonstrates a lack of understanding of the phenomenon of child sexual abuse and the huge variety of sexual and grooming behaviours committed by CSOs. With empirical evidence showing that recidivism is higher for offenders who commit crossover behaviours, most serial CSOs will not demonstrate the type of distinctive behaviour now required by the VSCA.

Proulx and André McKibben, 'Modus Operandi of Sexual Offenders Working or Doing Voluntary Work with Children and Adolescents' (2005) 11 *Journal of Sexual Aggression* 187.

²⁵² Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, 45.

²⁵³ *R v WRC* (2002) 130 A Crim R 89, 102 [32] (Hodgson J, Kirby J agreeing).

²⁵⁴ See, eg, *BCR* [2010] VSCA 229 (9 September 2010).

²⁵⁵ [2010] VSCA 95 (22 April 2010).

V UEA REFORM OPTIONS AND RECOMMENDATIONS

In light of the above case law analysis, this Part considers the reform options in relation to the cross-admissibility of multiple complainants' evidence in child sexual assault trials. By adopting the view of Spigelman CJ in *R v Ellis* that the UEA was intended to operate on its own terms to the exclusion of common law principles,²⁵⁶ and recognising that the significant probative value test is a statutory formulation not found at common law, it is evident that tendency evidence about an accused does not need to demonstrate striking or indeed any similarities before it can have significant probative value.²⁵⁷ In fact, striking similarities is the standard required when identity is in issue, which is rarely the case in sexual assault trials.²⁵⁸

The admissibility of tendency evidence under the UEA should be guided by the actual wording of s 97. For example, it has been observed that when deciding whether evidence is, in fact, tendency evidence, the prosecution 'need not demonstrate a tendency to commit a particular crime', but merely that the evidence shows a tendency to *act in a particular way*.²⁵⁹ This wording in s 97 suggests the provision was not drafted to focus on the striking similarities in, or the distinctiveness of, a defendant's conduct. In fact, tendency evidence does not need to show a tendency 'to commit acts that are closely similar to those that constitute the crime with which [the] accused is charged.'²⁶⁰ Contrary to the defendant's arguments in *R v Ford*, Campbell JA held there was no need for the evidence from three complainants about the accused's sexual conduct to show a 'striking pattern of similarity'.²⁶¹ Nor did the tendency behaviour have to be "compellingly rare or exceptional" before it [could] have significant probative value'.²⁶²

To engage in sexual misconduct with a child is to act in a particular way, sexually speaking, although it may involve a wide range of behaviours from sexual touching to intercourse. It is also to act in an *unusual* way since only a minority of men will engage in child sexual abuse. This means that *any* previous sexual conduct with a child shows that a defendant has a tendency to act in this unusual sexual way. If there is evidence that the accused has sexually abused one child, that evidence would have probative value in relation to allegations by other children of sexual misconduct towards them.

²⁵⁶ (2003) 58 NSWLR 700, 716–17 [74]–[84].

²⁵⁷ *PWD* (2010) 205 A Crim R 75, 91 [79] (Beazley JA).

²⁵⁸ Most CSOs are known to the victim, with strangers accounting for around 3.6 to 30.8 per cent of perpetrators depending on the sex of the child: Australian Bureau of Statistics, *Relationship of Offender to Victim, Victims of Assault and Sexual Assault by Age Group, Selected States and Territories — Supplementary Data Cubes* (2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4510.02008?OpenDocument>>.

²⁵⁹ *R v Ford* (2009) 273 ALR 286, 296 [30] (Campbell JA), quoting the trial judge.

²⁶⁰ *Ibid.* See also *R v Li* [2003] NSWCCA 407 (23 December 2003) [11] (Dunford J).

²⁶¹ (2009) 273 ALR 286, 316 [125].

²⁶² *Ibid.* 316 [126].

Such an approach, which was endorsed by the NSWCCA in *Dao*,²⁶³ would lower the threshold test for the admissibility of tendency evidence in a child sexual assault trial. It is also an approach consistent with the literature on CSOs since there is considerable evidence to show that any sexual misconduct with a child is the best predictor of future and past behaviour with children.²⁶⁴

The striking similarities formulation implies that the evidence needs to show a tendency to commit a particular act or a particular crime, rather than ‘to act in a particular way’, which, as argued above, connotes a broader range of behaviours. Smallbone and Wortley’s study showed that 169 CSOs employed 28 different strategies for gaining access to children,²⁶⁵ 38 strategies for developing a child’s trust²⁶⁶ and 67 strategies for getting a child to engage in sexual activity.²⁶⁷ Some of these strategies were evident in *Fletcher*,²⁶⁸ *Barton*,²⁶⁹ *PWD*²⁷⁰ and *Dao*,²⁷¹ where the defendants had been accused of engaging in a variety of sexual and grooming behaviours with different adolescent boys. All of that behaviour amounted to acting in an unusual sexual way, that is, sexual misconduct with children.

Section 98 should also be interpreted in light of the CSO literature, as well as the rationale for its amendment. To ensure that the amended s 98 captures dissimilar evidence about a CSO’s sexual behaviour, the striking similarities or distinctiveness approach must be abandoned as a criterion of admissibility.

As discussed previously, the use of striking similarities or distinctiveness under the UEA for the admission of tendency and coincidence evidence in child sexual assault trials demonstrates a lack of understanding of the way CSOs behave, in particular that core group of high-risk offenders who will abuse more than one child. The literature shows that this group commits a wide variety of sexual and grooming behaviours. Because of this, the serial offender is unlikely to demonstrate the distinctive behaviour required by some judges.

It is a difficult task to formulate ‘appropriate rules to deal with probative but prejudicial evidence ... [because] [i]n this area there is a stark conflict between the policy objectives of receiving all probative evidence and minimising the risk of wrongful conviction.’²⁷² In many ways the public policy conflict is even starker since what is also at stake is the conflict between protecting children from serial CSOs and the public policy of protecting defendants from prejudicial evidence. Some will argue that it is not the role of the criminal justice system to consider the welfare of children but if prosecuting CSOs is, at present, the only

²⁶³ (2011) 278 ALR 765, 801 [205] (Simpson J, Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreeing).

²⁶⁴ Cf the view of Williams and Draganich, above n 9, 28, who did not review the extensive literature on CSO behaviour.

²⁶⁵ Smallbone and Wortley, *Child Sexual Abuse in Queensland*, above n 55, 43–4.

²⁶⁶ *Ibid* 46–8.

²⁶⁷ *Ibid* 51–4.

²⁶⁸ (2005) 156 A Crim R 308.

²⁶⁹ [2004] NSWCCA 229 (8 July 2004).

²⁷⁰ (2010) 205 A Crim R 75.

²⁷¹ (2011) 278 ALR 765.

²⁷² *Uniform Evidence Law*, above n 231, 388 [11.82].

means by which offenders can be deterred or rehabilitated then child protection becomes, even in a de facto sense, an essential public policy objective of child sexual assault trials.

Under current approaches to tendency and coincidence evidence, where there is a lack of striking similarities or distinctiveness between the evidence of two or more complainants, a joint trial is less likely to be held. This, in turn, will result in more separate trials, and thus a decreased likelihood of serial CSOs being convicted, since corroborative evidence of child sexual abuse is uncommon²⁷³ and lack of corroborative evidence is likely to be one of the reasons why low conviction rates are found in child sexual assault trials.²⁷⁴

There have been a number of joint child and adult sexual assault trials in which juries have returned a mixture of guilty and not guilty verdicts,²⁷⁵ which suggests that properly instructed juries are capable of looking beyond the prejudicial effect of tendency and coincidence evidence and carefully considering the evidence pertaining to each count separately. This seems contrary to the view that 'the dangers inherent in propensity evidence generally are greatly enhanced in sexual offence cases'.²⁷⁶ Indeed, there is considerable empirical evidence that the particular prejudices of jurors are in fact associated with misconceptions about the effects of child sexual abuse and the reliability of children's evidence, along with beliefs in rape myths and stereotyped views of women and children who complain of sexual assault.²⁷⁷

Although restricting the admissibility of tendency and coincidence evidence is based on preventing the desirable goal of impermissible reasoning by juries, arguments that justify excluding these types of evidence do not withstand scrutiny. For example, it is assumed that juries *will not* engage in impermissible propensity reasoning²⁷⁸ when the evidence has sufficient similarity to justify its admission, but *will* do so where the dissimilarities are more marked. Logically, juries would be more likely to engage in impermissible propensity reasoning where there are *greater* similarities in the evidence of multiple complainants about a defendant's sexual conduct.

²⁷³ See Suzanne Blackwell, 'Child Sexual Abuse on Trial in New Zealand' (Paper presented at the Criminal Law Symposium, Auckland, November 2008), which found this to be the case in an empirical study of 137 New Zealand child sex offence files.

²⁷⁴ See Patricia Gallagher and Jennifer Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994* (Judicial Commission of New South Wales, 1997) 20; Fitzgerald, above n 89.

²⁷⁵ See, eg, *R v OGD [No 2]* (2000) 50 NSWLR 433; *R v Rajakaruna* (2004) 8 VR 340; *Phillips v The Queen* (2006) 225 CLR 303; *R v WAH* [2009] QCA 263 (8 September 2009).

²⁷⁶ Williams and Draganich, above n 9, 23.

²⁷⁷ Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (Trends and Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, August 2007) <<http://aic.gov.au/publications/current%20series/tandi.aspx>>; Anne Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153; Anne Cossins, Jane Goodman-Delahunty and Kate O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435.

²⁷⁸ Impermissible propensity reasoning may arise where the evidence in question is admitted in relation to some counts in a joint trial but not others.

Perhaps the real difficulty with ss 97 and 98 is that, without clear legislative guidance, they are unlikely to be correctly applied by judges versed in the common law. In contrast, in WA, where a significant probative value test was enacted to deal with the admissibility of propensity evidence, the then WA Attorney-General stated that this and other reforms were designed to address the limitations of the criminal justice system when dealing with sexual assault.²⁷⁹ It was envisaged the reforms would change the way that sexual assault trials were conducted in WA by increasing the number of joint trials where there was an alleged serial offender in order to ensure that the jury does not operate in a 'vacuum'²⁸⁰ by being unaware that the accused has been charged with multiple offences involving more than one complainant. This legislative intention has been subsequently adopted by the WA Court of Appeal in its interpretation of s 31A (as discussed above in Part IV(A)).²⁸¹

In UEA jurisdictions, similar legislative guidance will be necessary given the fact that a large number of appeals in relation to ss 97 and 98 arise from child sexual assault trials. Yet these provisions represent a significant hurdle for the successful prosecution of serial CSOs, since they provide no guidance to judges about what previous sexual misconduct on the part of a defendant amounts to evidence of significant probative value, with the result that some judges continue to import the common law striking similarities approach into the statutory scheme. It is recommended that there is a need for greater uniformity in the UEA jurisdictions at least in relation to the admissibility of relevant tendency and coincidence evidence in joint child sexual assault trials. Because of the arbitrary nature of the striking similarities approach, it is recommended that ss 97 and 98 be amended to reflect (i) the literature on CSO behaviour reviewed in this article; (ii) the interpretation given to s 97 by Campbell JA in *R v Ford*;²⁸² and (iii) the rationale underlying the amendments made to s 98, as expressed by the ALRC, NSWLRC and VLRC.

Thus, the following provisions are recommended as amendments to ss 97, 98 and 101:

Insert the following sub-sections into s 97 of the UEA:

- (3) Sub-sections (4) and (5) apply to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].
- (4) In considering whether evidence about the sexual conduct of the defendant has significant probative value for the purposes of sub-section (1),

²⁷⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 June 2004, 4607 (J A McGinty).

²⁸⁰ *Ibid* 4608.

²⁸¹ In *Donaldson*, the trial judge stated that the alternative to admitting the complainants' evidence under s 31A was to hold four separate trials and thus for 'four separate juries [to] consider [each] case ... without having a complete picture of the accused's conduct': (2005) 31 WAR 122, 141 [89] (Roberts-Smith JA), quoting the trial judge. The trial judge considered that fair-minded people would not regard this as being in the public interest, a view with which the Court of Appeal agreed: at 150 [135] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

²⁸² See text accompanying above n 261.

the court must not have regard to whether that evidence has striking similarities or distinctive features with other evidence about the sexual conduct of the defendant.

- (5) It will be sufficient for evidence about the sexual conduct of the defendant to have significant probative value if that evidence shows the defendant has committed a charged or uncharged act of a sexual nature of any kind against a child.

Insert the following sub-sections into s 98 of the UEA:

- (3) [As above].
- (4) In considering whether evidence of two or more events which describe the sexual conduct of the defendant have significant probative value for the purposes of sub-section (1), the court must not exclude the evidence solely on the basis that the evidence does not reveal striking similarities, distinctiveness, unusual features, an underlying unity, system, pattern or common modus operandi in the defendant's alleged sexual misconduct or in the circumstances in which the alleged sexual misconduct occurred.
- (5) It will be sufficient for the evidence of two or more events to have significant probative value if the evidence shows that the defendant has committed a charged or uncharged act of a sexual nature against a child, irrespective of whether the act(s) involve the same or different sexual conduct on the part of the defendant.

Note: For example, if event 1 describes sexual touching by the defendant of a witness and event 2 describes sexual penetration by the defendant of another witness, these events will have the required degree of similarity to satisfy the significant probative value test in sub-section (1).

Insert the following sub-sections into s 101 of the UEA:

- (5) Sub-section (6) applies to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if 2 or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].
- (6) In considering, for the purposes of sub-section (2), whether the probative value of evidence about the sexual conduct of the defendant substantially outweighs its prejudicial effect, the court must not have regard to whether the evidence has striking similarities or distinctive features with other evidence about the sexual conduct of the defendant.

It is also recommended that other Australian jurisdictions should follow the example of WA and Victoria²⁸³ in enacting a provision that would allow joint trials to be held even in situations where the evidence of multiple complainants is not cross-admissible. However, the following recommendation contains an extra caveat that there is a presumption in favour of a joint trial where the evidence of multiple complainants reveals any type of sexual misconduct against a child on the part of the defendant. It is therefore recommended that the following provi-

²⁸³ *Criminal Procedure Act 2004* (WA) s 133(5)(c)(i); *Criminal Procedure Act 2009* (Vic) s 194(3).

sion, based on s 194 of the *Criminal Procedure Act 2009* (Vic), be enacted in all UEA jurisdictions:

- (1) If 2 or more counts for child sexual offences are joined in the same indictment there is a presumption in favour of those counts being tried together.
- (2) The presumption created by sub-section (1) arises where the evidence of two or more complainants reveals any type of sexual misconduct against a child on the part of the defendant.
- (3) The presumption created by sub-section (1) is not rebutted merely because the evidence on one count has been held to be inadmissible in relation to another count on the grounds that the evidence does not reveal similarities, striking similarities, distinctiveness, unusual features, an underlying unity, system, pattern or common modus operandi in the defendant's alleged sexual misconduct or in the circumstances in which the alleged sexual misconduct occurred.

VI CONCLUSION

For the first time in the legal literature, this article has presented a review of the studies on the rates of recidivism of CSOs, the extent of their crossover behaviours, and the range and variety of their behaviour with children. While recidivism rates vary from study to study depending on methodological issues such as the follow-up period, the measure of recidivism and the offender type, studies which employed lengthy follow-up periods along with measures of recidivism other than re-conviction suggest that 5 to 30 per cent of low-risk offenders and approximately 90 per cent of high-risk offenders will reoffend.

Offenders who engaged in crossover behaviours, in terms of age, sex and relationship with a child, were more likely to have more victims and to be at greater risk of recidivism. Crossover studies indicated that approximately one fifth to two thirds of CSOs will have multiple victims and will engage in a variety of sexual behaviours. Self-report studies supported this data, showing that just over 50 per cent of a mixed group of offenders admitted to having more than one victim, while a study of intra-familial offenders showed they had extensive offending histories with fewer numbers of victims. Importantly, these studies demonstrated that CSOs' sexual behaviour is not highly specialised, similar or distinctive and that they engage in many different types of sexual behaviours.

In fact, this literature review indicates that the criminal justice system will be regularly confronted with serial CSO cases involving a wide variety of sexual behaviours over relatively long periods of time. Unfortunately, case law under the UEA shows that an approach based on 'striking similarities' or 'distinctiveness' in sexual behaviour has been regularly used to create artificial distinctions in relation to CSO behaviour which are out of step with the psychological literature. While recent case law from the NSWCCA reveals a much more realistic approach to the cross-admissibility of the evidence of multiple complainants, no consistency of approach can be identified in the many appeal cases

heard in NSW, with virtually the same range of sexual behaviours by a defendant resulting in separate trials in some cases and a joint trial in others.

In Victoria, a line of authority has recently emerged that has decided that unless there is something distinctive about the defendant's sexual behaviour or the circumstances in which the allegations occurred, the evidence of multiple complainants will not be cross-admissible. This approach, which has no empirical basis to support it, appears to reflect a subjective belief that CSOs are highly specialised in the type of sexual behaviour they engage in.

Irrespective of whether judges are considering cross-admissibility under s 97 or s 98 of the UEA, the fact is that when dealing with sex offences against children, a distinction cannot be made between offences that are 'unremarkable' and offences that are unusual, distinctive or bear striking similarities. The sexual behaviour of CSOs encompasses a broad continuum of sexual and grooming behaviours, including a range of crossover behaviours, and will vary with the age and sex of the child, opportunity, access, and the degree of emotional entanglement with, and the passivity or resistance of, the child. Not only is any previous sexual misconduct with a child predictive of sexual recidivism but there is evidence that serial CSOs are more likely to engage in a range of sexual behaviours — exactly what many cases in this article and the self-report studies have revealed.

The application of the striking similarities or distinctiveness approach under the UEA amounts to a false measure for assessing the probative value of evidence about a defendant's sexual behaviour. The approach will result in more separate trials with a decreased likelihood of serial CSOs being convicted, thus placing more children at risk of sexual abuse. Arguably, a lower threshold for determining the probative value of the evidence of multiple complainants is appropriate in child sexual assault cases where the identity of the offender is not in issue, in order to capture the extensive range of sexual and grooming behaviours of serial CSOs reported in the literature.

This article also discussed the rationale behind the reforms to s 98 of the UEA. That rationale shows that the provision needs to be interpreted widely in order to give effect to the stated objectives of the amendments to s 98: this would mean abandonment of the striking similarities test and recognition of the fact that *any* two incidents of sexual behaviour with children will be sufficiently similar, given that sexual behaviour with children is an unusual practice.

The importation of the striking similarities and distinctiveness formulations has occurred despite the fact that Parliament intended pt 3.6 of the UEA to cover the field to the exclusion of the common law.²⁸⁴ Indeed, when faced with exactly the same significant probative value test under s 31A of the *Evidence Act 1906* (WA), along with a clearly stated legislative intention, the WA Court of Appeal accepted that propensity evidence need not show 'striking similarities' or sexual interference by the defendant in a particular way in sexual assault trials. Clearly, greater legislative guidance is needed for judges in UEA jurisdictions.

²⁸⁴ *R v Ellis* (2003) 58 NSWLR 700, 716 [74] (Spigelman CJ).

In order to provide that guidance, this article made recommendations to amend ss 97, 98 and 101 of the UEA. It is acknowledged that some people will argue these reforms constitute too radical a change to an area of the law that has long sought to protect defendants in criminal trials from the effects of prejudicial evidence. Yet there is sufficient evidence to show that properly instructed juries are capable of returning verdicts that confound the belief that jurors routinely engage in impermissible propensity reasoning when faced with evidence of an accused's past criminal conduct. Indeed, empirical evidence shows that jurors and jury-eligible citizens hold prejudicial views that favour the defence case, rather than the other way around. While propensity evidence may create the risk of an unfair trial, that risk needs to be weighed against competing public interests: those of the community, the victim and child safety. The reforms suggested in this article will allow these often unheard public interests to be considered in child sexual assault trials.