



New South Wales

Evidence Amendment (Tendency and Coincidence) Bill 2020

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Evidence Act 1995* (the *principal Act*) as follows—

- (a) to clarify that principles or rules of the common law or equity preventing or restricting the admissibility of evidence about propensity or similar fact evidence are not relevant when applying Part 3.6 of the principal Act,
- (b) to provide that a court, when assessing the probative value of evidence under Part 3.6 of the principal Act, is not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination,
- (c) to introduce a rebuttable presumption that certain tendency evidence relating to a child sexual offence is presumed to have significant probative value and to set out matters that may not ordinarily be taken into account by a court to overcome that presumption and determine that the evidence does not have significant probative value,
- (d) to clarify that coincidence evidence includes evidence from multiple witnesses claiming they are victims of an accused person, which is used to prove, on the basis of similarities in their evidence, that the accused person did a particular act,
- (e) to provide that tendency evidence or coincidence evidence adduced by the prosecution about a defendant is inadmissible unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant,
- (f) to provide that the proposed Act does not affect proceedings where a hearing has already begun or notices given in proceedings.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of Evidence Act 1995 No 25

Schedule 1[1] makes it clear that any principle or rule of the common law or equity preventing or restricting the admissibility of evidence about propensity or similar fact evidence is not relevant when applying Part 3.6 of the principal Act. A court, when assessing the probative value of tendency or coincidence evidence under Part 3.6 of the principal Act, is also not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination.

Schedule 1[2] relates to the admissibility of tendency evidence in proceedings involving a child sexual offence. Tendency evidence about the sexual interest of the defendant in children (even if the defendant has not acted on the interest) and tendency evidence about the defendant acting on a sexual interest in children are both presumed to have significant probative value. This presumption can be overcome only if the court is satisfied that there are sufficient grounds to do so. There are a number of matters that the court must not ordinarily take into account in determining whether there are sufficient grounds for overcoming the presumption. These include a difference in the personal characteristics (including age, sex or gender) of the child to which the proposed tendency evidence relates and the child to which the proceedings relate, a difference in the relationship that the defendant had with each child, and the period of time between the matters to which the tendency evidence relates and the incident to which the proceedings relate. A court may take the matters into account in considering whether it is satisfied that there are sufficient grounds to rebut the presumption if it considers that there are exceptional circumstances in relation to those matters that warrant doing so.

Section 98 of the principal Act provides that evidence that 2 or more events occurred is admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally, if the party seeking to adduce the evidence gives reasonable notice to the other party and the court thinks that the evidence will have significant probative value. **Schedule 1[3]** makes it clear that this type of evidence (coincidence evidence) includes evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities, that the defendant did an act in issue in the proceeding.

Schedule 1[4] changes a test for determining when tendency evidence or coincidence evidence cannot be used against a defendant. Currently, it cannot be used unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant. The proposed amendment changes this so that it cannot be used unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

Schedule 1[5] provides that an amendment to the principal Act by the proposed Act does not apply to proceedings that have already commenced or affect notices already given.



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New South Wales

Evidence Amendment (Tendency and Coincidence) Bill 2020

No. _____, 2020

A Bill for

An Act to amend the *Evidence Act 1995* in relation to tendency evidence and coincidence evidence.

The Legislature of New South Wales enacts—

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1 Name of Act

2

This Act is the *Evidence Amendment (Tendency and Coincidence) Act 2020*.

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2 Commencement

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This Act commences on 1 May 2020.

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Schedule 1	Amendment of Evidence Act 1995 No 25	1
[1] Section 94 Application		2
Insert after section 94(3)—		3
(4)	To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant.	4 5 6 7
(5)	In determining the probative value of tendency evidence or coincidence evidence for the purposes of section 97(1)(b), 97A(4), 98(1)(b) or 101(2), it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.	8 9 10 11
[2] Section 97A		12
Insert after section 97—		13
97A Admissibility of tendency evidence in proceedings involving child sexual offences		14 15
(1)	This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.	16 17 18
(2)	It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2)—	19 20 21
(a)	tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest),	22 23
(b)	tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.	24 25
(3)	Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.	26 27 28
(4)	Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.	29 30 31
(5)	The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account—	32 33 34 35 36
(a)	the sexual interest or act to which the tendency evidence relates (the <i>tendency sexual interest or act</i>) is different from the sexual interest or act alleged in the proceeding (the <i>alleged sexual interest or act</i>),	37 38 39
(b)	the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred,	40 41 42
(c)	the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act,	43 44 45

(d)	the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act,	1 2 3
(e)	the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,	4 5
(f)	the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,	6 7
(g)	the level of generality of the tendency to which the tendency evidence relates.	8 9
(6)	In this section—	10
	<i>child</i> means a person under 18 years of age.	11
	<i>child sexual offence</i> means each of the following offences (however described and regardless of when it occurred)—	12 13
(a)	an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence, or	14 15 16
(b)	an offence against, or arising under, a law of this State involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence, or	17 18 19
(c)	an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b),	20 21 22 23
	but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.	24 25
[3]	Section 98 The coincidence rule	26
	Insert after section 98(1)—	27
(1A)	To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.	28 29 30 31 32
[4]	Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution	33 34
	Omit “the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant” from section 101(2).	35 36
	Insert instead “the probative value of the evidence outweighs the danger of unfair prejudice to the defendant”.	37 38
[5]	Schedule 2 Savings, transitional and other provisions	39
	Insert after Part 5—	40
	Part 6 Provisions consequent on enactment of Evidence Amendment (Tendency and Coincidence) Act 2020	41 42
27	Definition	43
	In this Part—	44

<i>amending Act</i> means the <i>Evidence Amendment (Tendency and Coincidence) Act 2020</i> .	1 2
28 Proceedings already begun	3
(1) An amendment made to this Act by the amending Act does not apply in relation to proceedings the hearing of which began before the commencement of the amendment.	4 5 6
(2) This Act, as in force immediately before the commencement of the amendment, continues to apply in relation to proceedings the hearing of which began before that commencement.	7 8 9
29 Notices given before amendments	10
The amendment of this Act by the amending Act does not affect the validity of any notice given before that amendment.	11 12