

Passed by both Houses



New South Wales

Evidence Amendment (Tendency and Coincidence) Bill 2020

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney,*

, 2020



New South Wales

Evidence Amendment (Tendency and Coincidence) Bill 2020

Act No _____, 2020

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

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts—

1 Name of Act

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

2 Commencement

This Act commences on 1 July 2020.

Schedule 1 Amendment of Evidence Act 1995 No 25

[1] Section 94 Application

Insert after section 94(3)—

- (4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding is not relevant when applying this Part to tendency evidence or coincidence evidence about a defendant.
- (5) In determining the probative value of tendency evidence or coincidence evidence for the purposes of section 97(1)(b), 97A(4), 98(1)(b) or 101(2), it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination.

[2] Section 97A

Insert after section 97—

97A Admissibility of tendency evidence in proceedings involving child sexual offences

- (1) This section applies in a criminal proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue.
- (2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2)—
 - (a) tendency evidence about the sexual interest the defendant has or had in children (even if the defendant has not acted on the interest),
 - (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.
- (3) Subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.
- (4) Despite subsection (2), the court may determine that the tendency evidence does not have significant probative value if it is satisfied that there are sufficient grounds to do so.
- (5) The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account—
 - (a) the sexual interest or act to which the tendency evidence relates (the **tendency sexual interest or act**) is different from the sexual interest or act alleged in the proceeding (the **alleged sexual interest or act**),
 - (b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred,
 - (c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act,

- (d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act,
 - (e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,
 - (f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features,
 - (g) the level of generality of the tendency to which the tendency evidence relates.
- (6) In this section—
- child* means a person under 18 years of age.
- child sexual offence* means each of the following offences (however described and regardless of when it occurred)—
- (a) an offence against, or arising under, a law of this State involving sexual intercourse with, or any other sexual offence against, a person who was a child at the time of the offence, or
 - (b) an offence against, or arising under, a law of this State involving an unlawful sexual act with, or directed towards, a person who was a child at the time of the offence, or
 - (c) an offence against, or arising under, a law of the Commonwealth, another State, a Territory or a foreign country that, if committed in this State, would have been an offence of a kind referred to in paragraph (a) or (b),
- but does not include conduct of a person that has ceased to be an offence since the time when the person engaged in the conduct.

[3] Section 98 The coincidence rule

Insert after section 98(1)—

- (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.

[4] Section 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

Omit “the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant” from section 101(2).

Insert instead “the probative value of the evidence outweighs the danger of unfair prejudice to the defendant”.

[5] Schedule 2 Savings, transitional and other provisions

Insert after Part 5—

Part 6 Provisions consequent on enactment of Evidence Amendment (Tendency and Coincidence) Act 2020

27 Definition

In this Part—

amending Act means the *Evidence Amendment (Tendency and Coincidence) Act 2020*.

28 Proceedings already begun

- (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.
- (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.

29 Notices given before amendments

The amendment of this Act by the amending Act does not affect the validity of any notice given before that amendment.

30 Review by the Minister

- (1) The Minister is to review—
 - (a) the operation of the amendments made to this Act by the *Evidence Amendment (Tendency and Coincidence) Act 2020*, and
 - (b) the circumstances in which tendency evidence or coincidence evidence about a defendant is admissible in proceedings for sexual offences and whether those circumstances should be broadened.
- (2) The review is to be undertaken as soon as possible after 1 June 2022.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament on or before 30 September 2022.