



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.