

Explanatory Statement

EVIDENCE (NATIONAL UNIFORM LEGISLATION) AMENDMENT BILL 2020

SERIAL NO. 4

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Bill amends Part 3.6 of the *Evidence (National Uniform Legislation) Act 2011* (the Act) which sets out the tendency and coincidence rules of evidence.

The main features of this Bill are 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 Act;
- provide that a court, when assessing the probative value of evidence under Part 3.6 of the Act, is not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination;
- 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;
- 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;
- 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; and
- provide that the proposed amendments do not affect proceedings, where a hearing has already begun, or notices already given in proceedings.

NOTES ON CLAUSES

Clause 1. Short title

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Evidence (National Uniform Legislation) Amendment Act 2020*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator by *Gazette* notice.

Clause 3. Act amended

Clause 3 identifies the Act that is amended is the *Evidence (National Uniform Legislation) Act 2011*.

Clause 4. Section 94 amended (Application)

Clause 4 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 Act.

Clause 4 also clarifies that a court, when assessing the probative value of tendency or coincidence evidence under Part 3.6 of the Act, is not to have regard to the possibility that tendency evidence or coincidence evidence may be the result of collusion, concoction or contamination.

Clause 5. Section 97A inserted

Clause 5 relates to the admissibility of tendency evidence in proceedings involving a child sexual offence.

After section 97, a new section 97A is introduced.

New section 97A will apply 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.

The section introduces a presumption in new section 97A(2) that 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. The presumption applies whether or not the sexual interest to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.

This presumption can be overcome only if the court is satisfied that there are sufficient grounds to do so (subsection (4)). 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 only if it considers that there are exceptional circumstances in relation to those matters (whether considered individually or in combination) that warrant doing so.

Clause 6. Section 98 amended (The coincidence rule)

Section 98 of the Act provides that evidence that two 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 the evidence will have significant probative value.

Clause 6 clarifies that this type of evidence (coincidence evidence) includes evidence from two 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.

Clause 7. Section 101 amended (Further restrictions on tendency and coincidence evidence adduced by prosecution)

Clause 7 changes the test for determining when all tendency evidence or coincidence evidence cannot be used against a defendant. The test is found in section 101 and relates only to tendency evidence and coincidence evidence adduced by the prosecution.

Clause 7 amends section 101 so tendency evidence and coincidence evidence about a defendant cannot be used unless the 'probative value of the evidence outweighs the danger of unfair prejudice to the defendant'. This changes the test from 'substantially outweighs' to simply 'outweighs'. The burden still remains on the prosecution to persuade the court to allow the evidence to be admitted; however, the test now strikes an appropriate balance.

The wording of the test has also been amended by replacing the terms 'any prejudicial effect it may have on the defendant' with 'the danger of unfair prejudice to the defendant'. The wording has been adopted as it mirrors the formulation of section 137, which sets out the test for when prejudicial evidence must be excluded. The amendment creates a consistent approach.

Clause 8. Chapter 10 inserted

Clause 8 provides for the transitional arrangements for the amending Act.

The amendments made by the amending Act do not apply to proceedings the hearing of which commenced before the commencement of the Act.

The amendments made by the amending Act do apply to proceedings the hearing of which commenced after the commencement.

Clause 8 also provides that the validity of any notice given under a provision of the Act immediately before the commencement is not affected by the commencement.

Clause 9. Repeal of Act

This is a standard clause which provides that the amending Act ceases to have effect the day after it commences. There is no need for the amending Act to be retained once it has performed its function of amending the other legislation.