

Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019

Contents

| | Page |
|--|----------|
| 1 Name of model provisions | 1 |
| 2 Purpose of model provisions | 1 |
| 3 Model amendments to Uniform Evidence Law | 1 |
| Schedule 1 Model amendments to Uniform Evidence Law | 2 |

1 Name of model provisions

These model provisions are the *Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019*.

2 Purpose of model provisions

- (1) The purpose of these provisions is to set out model amendments to the Uniform Evidence Law—
 - (a) to provide guidance concerning the use of tendency evidence in criminal proceedings involving acts that constitute, or may constitute, child sexual offences, and
 - (b) to alter the test for the admissibility of tendency evidence or coincidence evidence in criminal proceedings, and
 - (c) to make it clear that—
 - (i) certain principles and rules of the common law or equity are not relevant in applying Part 3.6 of the Law to tendency evidence or coincidence evidence, and
 - (ii) in determining the probative value of tendency evidence or coincidence evidence for the purposes of deciding its admissibility, 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, and
 - (iii) coincidence evidence 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.
- (2) In these provisions, the *Uniform Evidence Law* means the provisions set out in the *Model Uniform Evidence Bill* based on the *NSW Evidence Act 1995*, as amended by the *Evidence Amendment Bill 2007*, prepared by the Parliamentary Counsel's Committee and endorsed by the Standing Committee of Attorneys-General on 26 July 2007, and as amended by model provisions that the Committee agreed to include in the *Model Uniform Evidence Bill* on 7 May 2010.

Note. A copy of the *Model Uniform Evidence Bill* is available on the website of the Australasian Parliamentary Counsel's Committee at www.pcc.gov.au.

3 Model amendments to Uniform Evidence Law

Schedule 1 sets out the model amendments to the Uniform Evidence Law.

Schedule 1 Model amendments to Uniform Evidence Law

[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.

Jurisdictional note. Paragraphs (a) and (b) of this definition are suggested as an alternative to listing specific offences. If they prefer, jurisdictions may choose instead to list specific offences (including historical ones).

[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”.