

Royal Commission into Institutional Responses to Child Sexual Abuse

Evidence (Tendency and Coincidence) Model Provisions

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1 Name of model provisions

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

2 Purpose of model provisions

(1) The purpose of these provisions is to set out model amendments to the Uniform Evidence Law for public consultation that will permit tendency evidence or coincidence evidence to be admitted in a proceeding (including a criminal proceeding) if it is relevant to an important evidentiary issue in the proceeding.

(2) In these provisions, the ***Uniform Evidence Law*** is the set of provisions that forms the basis for the Uniform Evidence Acts enacted by the Commonwealth and certain other Australian jurisdictions.

Note. As at November 2016, each of the following Acts is based on the *Uniform Evidence Law*:

- (a) the *Evidence Act 2011* of the Australian Capital Territory,
- (b) the *Evidence Act 1995* of the Commonwealth,
- (c) the *Evidence Act 1995* of New South Wales,
- (d) the *Evidence (National Uniform Legislation) Act* of the Northern Territory,
- (e) the *Evidence Act 2001* of Tasmania,
- (f) the *Evidence Act 2008* of Victoria.

These Acts have uniform numbering. Accordingly, amendments set out in these provisions are by reference to that numbering.

(3) It is also intended that the model amendments to the Uniform Evidence Law be used as the basis for new laws in those jurisdictions that do not apply the Law.

Note. As at November 2016, Queensland, South Australia and Western Australia have not applied the Uniform Evidence Law.

3 Model amendments to Uniform Evidence Law

(1) Schedules 1 and 2 set out alternative model amendments to the Uniform Evidence Law.

(2) Schedule 1 sets out model amendments that retain the current distinction between tendency evidence and coincidence evidence.

(3) Schedule 2 sets out model amendments that replace the current distinction between tendency evidence and coincidence evidence with a single concept of propensity evidence.

Schedule 1 **Alternative 1 model amendments to Uniform Evidence Law**

[1] **Section 92 Exceptions**

Insert after section 92 (2):

- (2A) In a civil or criminal proceeding (and without limiting subsection (2)), section 91 (1) does not prevent the admission or use of a party's conviction for an offence as tendency evidence or coincidence evidence.

[2] **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 admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is abolished and, as a result, is not relevant when applying this Part to tendency evidence or coincidence evidence.
- (5) Without limiting subsection (4), evidence is not inadmissible as tendency evidence or coincidence evidence only because it is about:
- (a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, or
- (b) an act for which a party has been charged with an offence in Australia or a foreign country, but not convicted (including because of an acquittal before or by an Australian court or a foreign court).

Note. Paragraph (b) includes situations where charges are withdrawn or an offence has been proven and no conviction entered by the court.

[3] **Section 95A**

Insert after section 95:

95A Evidence relevant to important evidentiary issue

- (1) For the purposes of this Part, each of the following kinds of evidence is *relevant to an important evidentiary issue* in a proceeding:
- (a) evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding,
- (b) evidence that shows a propensity of a party to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding,
- (c) evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole.
- (2) In determining whether evidence is relevant to an important evidentiary issue in a proceeding, the court is to consider whether the evidence, assuming it was accepted as credible and reliable, would be evidence of a kind referred to in subsection (1).

[4] **Sections 97–98A**

Omit sections 97 and 98. Insert instead:

97 The tendency rule

- (1) This section applies to the admissibility of evidence (*tendency evidence*) of the character, reputation or conduct of a person, or a tendency that a person has

or had, to prove that the person has or had a tendency (whether because of the person's character or otherwise) either to act in a particular way or have a particular state of mind.

- (2) Tendency evidence is inadmissible unless:
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding.

Note. Section 98A enables a court to refuse to admit tendency evidence in a criminal proceeding on the application of the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that admission of the evidence is likely to result in the proceeding being unfair to the defendant.

- (3) Subsection (2) (a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100, or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

- (1) This section applies to the admissibility of evidence (*coincidence evidence*) of the occurrence of 2 or more events to prove that a person did a particular act, or had a particular state of mind, because of similarities in the events or the circumstances in which they occurred (or both).
- (2) Coincidence evidence is inadmissible unless:
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, be relevant to an important evidentiary issue in the proceeding.

Note. Section 98A enables a court to refuse to admit coincidence evidence in a criminal proceeding on the application of the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that admission of the evidence is likely to result in the proceeding being unfair to the defendant.

- (3) Subsection (2) (a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100, or
 - (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

98A Additional provisions for tendency evidence or coincidence evidence in criminal proceeding

- (1) Despite sections 97 and 98, the court in a criminal proceeding may, on the application of a defendant, refuse to admit tendency evidence or coincidence evidence if the court thinks, having regard to the particular circumstances of the proceeding, that:
 - (a) admission of the evidence is likely to result in the proceeding being unfair to the defendant, and
 - (b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence is unlikely to remove the risk.
- (2) The admission of evidence is not unfair to a defendant in a criminal proceeding merely because it is tendency evidence or coincidence evidence.
Note. See also section 94 (4) and (5).
- (3) If directions about the relevance and use of tendency evidence or coincidence evidence are likely to remove the risk of unfairness of the kind referred to subsection (1) (b), the court must give those directions rather than refuse to admit the evidence.

[5] Section 101

Omit the section. Insert instead:

101 Exclusion of tendency evidence or coincidence evidence under section 135 or 137

Tendency evidence or coincidence evidence about a party that is admissible under this Part cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party.

[6] Dictionary

Omit “section 98 (1)” from the definition of *coincidence rule*.

Insert instead “section 98 (2)”.

[7] Dictionary, definition of “tendency rule”

Omit “section 97 (1)”. Insert instead “section 97 (2)”.

Schedule 2 Alternative 2 model amendments to Uniform Evidence Law

[1] Chapter 3 Admissibility of evidence

Omit the matter relating to Part 3.6 from the introductory note (except the diagram).

Insert instead:

Part 3.6 is about exclusion of evidence of propensity, and exceptions to the propensity rule.

[2] Chapter 3, introductory note

Omit “tendency rule” from the matter relating Part 3.8 (except the diagram).

Insert instead “propensity rule”.

[3] Chapter 3, introductory note, diagram

Omit “Does the tendency rule or the coincidence rule apply?”.

Insert instead “Does the propensity rule apply?”.

[4] Section 92 Exceptions

Insert after section 92 (2):

- (2A) In a civil or criminal proceeding (and without limiting subsection (2)), section 91 (1) does not prevent the admission or use of a party’s conviction for an offence as propensity evidence.

[5] Part 3.6

Omit the Part. Insert instead:

Part 3.6 Propensity

94 Application

- (1) This Part does not apply to evidence that relates only to the credibility of a witness.
- (2) This Part does not apply so far as a proceeding relates to bail or sentencing.
- (3) This Part does not apply to evidence of:
 - (a) the character, reputation or conduct of a person, or
 - (b) a tendency that a person has or had,if that character, reputation, conduct or tendency is a fact in issue.
- (4) To avoid doubt, any principle or rule of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence in a proceeding on the basis of its inherent unfairness or unreliability is abolished and, as a result, is not relevant when applying this Part to propensity evidence.
- (5) Without limiting subsection (4), evidence is not inadmissible as propensity evidence only because it is about:
 - (a) the conviction before or by an Australian court or a foreign court of a party charged with an offence, or

- (b) an act for which a party has been charged with an offence in Australia or a foreign country, but not convicted (including because of an acquittal before or by an Australian court or a foreign court).

Note. Paragraph (b) includes situations where charges are withdrawn or an offence has been proven and no conviction entered by the court.

95 Use of evidence for other purposes

- (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.
- (2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

96 Evidence relevant to important evidentiary issue

- (1) For the purposes of this Part, each of the following kinds of evidence is *relevant to an important evidentiary issue* in a proceeding:
 - (a) evidence that shows a propensity of a party to be untruthful if the party's truthfulness is in issue in the proceeding,
 - (b) evidence that shows a propensity of a party to commit particular kinds of offences if the commission of an offence of the same or a similar kind is in issue in the proceeding,
 - (c) evidence that could be relevant to any matter in issue in the proceeding if the matter is important in the context of the proceeding as a whole.
- (2) In determining whether evidence is relevant to an important evidentiary issue in a proceeding, the court is to consider whether the evidence, assuming it was accepted as credible and reliable, would be evidence of a kind referred to in subsection (1).

97 Failure to act

A reference in this Part to doing an act includes a reference to failing to do that act.

98 The propensity rule

- (1) This section applies to the admissibility of evidence (*propensity evidence*) of:
 - (a) any one or more of the following to prove that a person has or had a propensity to act in a particular way or have a particular state of mind:
 - (i) the character or reputation of the person,
 - (ii) a tendency that the person has or had,
 - (iii) conduct of the person (including conduct of the same or a similar kind to conduct that is a fact in issue in the proceeding), or
 - (b) the occurrence of 2 or more events to prove that a person did a particular act, or had a particular state of mind, because of similarities in the events or the circumstances in which they occurred (or both).
- (2) Propensity evidence is inadmissible unless:
 - (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and
 - (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to

adduce the evidence, be relevant to an important evidentiary issue in the proceeding.

Note. Section 99 enables a court to refuse to admit propensity evidence in a criminal proceeding on the application of the defendant if the court thinks, having regard to the particular circumstances of the proceeding, that admission of the evidence is likely to result in the proceeding being unfair to the defendant.

- (3) Subsection (2) (a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 101, or
 - (b) the evidence is adduced to explain or contradict propensity evidence adduced by another party.

Note. The propensity rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

99 Additional provisions for propensity evidence in criminal proceeding

- (1) Despite section 98, the court in a criminal proceeding may, on the application of a defendant, refuse to admit propensity evidence if the court thinks, having regard to the particular circumstances of the proceeding, that:
 - (a) admission of the evidence is likely to result in the proceeding being unfair to the defendant, and
 - (b) if there is a jury, the giving of appropriate directions to the jury about the relevance and use of the evidence is unlikely to remove the risk.
- (2) The admission of evidence is not unfair to a defendant in a criminal proceeding merely because it is propensity evidence.

Note. See also section 94 (4) and (5).
- (3) If directions about the relevance and use of propensity evidence are likely to remove the risk of unfairness of the kind referred to subsection (1) (b), the court must give those directions rather than refuse to admit the evidence.

100 Requirements for notices

Notices given under section 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

101 Court may dispense with notice requirements

- (1) The court may, on the application of a party, direct that the propensity rule is not to apply to particular propensity evidence despite the party's failure to give notice under section 98.
- (2) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.
- (3) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.
- (4) The direction:
 - (a) is subject to such conditions (if any) as the court thinks fit, and
 - (b) may be given either at or before the hearing.
- (5) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

- (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party,
- (b) a condition that the party give such notice only in respect of specified propensity evidence, or all propensity evidence that the party intends to adduce other than specified propensity evidence.

101A Exclusion of propensity evidence under section 135 or 137

Propensity evidence about a party that is admissible under this Part cannot be excluded under section 135 or 137 on the ground that it is unfairly prejudicial to the party.

[6] Section 110 Evidence about character of accused persons

Omit “tendency rule” wherever occurring. Insert instead “propensity rule”.

[7] Section 111 Evidence about character of co-accused

Omit “tendency rule” wherever occurring. Insert instead “propensity rule”.

[8] Dictionary

Omit the definitions of *coincidence evidence*, *coincidence rule*, *tendency evidence* and *tendency rule*.

Insert in alphabetical order:

propensity evidence means evidence of a kind referred to in section 98 (1) that a party seeks to have adduced for the purpose referred to in that subsection.

propensity rule means section 98 (2).