



THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Mark Follett
Executive Director
Policy, Reform and Legislation
Department of Communities and Justice
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By email: mark.follett@justice.nsw.gov.au

Dear Mr Follett,

Statutory review of the *Evidence Amendment (Tendency and Coincidence) Act 2020*

Thank you for the opportunity to make a submission to the statutory review of the *Evidence Amendment (Tendency and Coincidence) Act 2020*.

A major concern with tendency evidence, as detailed below, is the danger of unfair prejudice to the accused where cases increase in complexity. For this reason, the impact of the new provisions on fairness to the accused is an important consideration when reviewing the new provisions.

The Law Society considers that without a sufficient evidence base to draw on, we are not in a position to provide comprehensive evidence-based commentary on the operation of the new provisions. It is our view that, with the exception of the issue of sexual conduct amongst young persons, consideration of further amendment of Part 3.6 of the *Evidence Act 1995* should not occur until comprehensive evidence is available about the impact of the 2020 amendments.

The impacts of the amendments on younger defendants

We suggest that consideration be given to amending s97A to prevent the inadvertent 'criminalisation' of consensual sexual encounters between children and young persons. Without safeguards, the current formulation of s97A may capture conduct that is entirely without moral sanction, yet which will be presumed by this provision to have significant probative value in potentially problematic circumstances. Specifically, any form of sexual relationship of any defendant with a 17 year-old would meet the test, even if the interest/relationship was/is entirely lawful (as the age of consent in NSW is 16). The defendant would then have to establish "special circumstances" to rebut the presumption. For instance, a 19 year-old who has consensual sex with their 17 year old partner undertakes a "sexual act" that would be presumed to have significant probative value if it is referred to in a prosecution tendency notice.

We suggest consideration be given to an amendment to ensure that these types of relationships are not inadvertently caught.

Why a further review is appropriate

Any further amendment (including expansion of s97A to adult sexual assault proceedings) is not supported by the Law Society at this time, for the reasons set out below.

The Law Society's submission on the 2020 Bill focused on the potential complexity in trial judges' directions, where the prosecution sought to rely on the breadth of s97A *Evidence Act 1995* and/or s29A of the *Criminal Procedure Act 1986*, with multiple count trials with diverse factual scenarios that would over-burden the trial judge in managing the trial, and particularly in providing adequate directions to the jury. However, since the commencement of the legislation, NSW courts' responses to the COVID-19 pandemic have set significant challenges in listing trials over the last two years, such that these potentially complex situations have not arisen for consideration in appellate courts. Without such appellate consideration of challenging submissions that engage courts in close analysis of the scope of the new provisions, it is, in our view, premature to evaluate them. This lack of data extends further to the lack of available data on notices filed.

In light of the unusually low numbers of complex cases going to trial since 2020, we strongly suggest that the Department repeat the review process of the legislation in two years' time, to gauge the impact of the amendments. During that time, the systematic gathering of statistical data from tendency and coincidence notices would assist that evaluation greatly.

Fairness to the accused

We are concerned that any expansion of the grounds on which the tendency presumption currently operates would amplify the risk of unfair prejudice to a defendant and the risk of unfair trials.

The High Court in *The Queen v Bauer* (2018) 266 CLR 56 referred to "unfair prejudice" as conveying the idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way (at [73]). In *Hughes v The Queen* (2017) 263 CLR 338 at [17], the High Court described how tendency evidence may cause prejudice to the accused:

The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

We emphasise that lowering the threshold for the admission of tendency evidence puts a significant onus on jury directions. It is noted by Bell J in *Allen v R* [2020] NSWCCA 173 at [61], that:

... one of the most powerful antidotes to the potential prejudice that may arise from the joinder and/or failure to sever charges is the ability of the trial judge to give clear directions to the jury, in particular on questions of the need separately to consider each charge and the limits on use of tendency and character evidence.

Allen is a strong and educative illustration for recognising the potentially extreme challenges faced by trial judges in ensuring that sufficient mitigation of prejudice is achieved through judicial direction where a trial involves multiple charges, in trials that are typically prone to appellate review. Jury directions cannot address the risk of unfair prejudice in every case – hence the justification for the tendency rule in the first place.

We note that new s29A of the *Criminal Procedure Act 1986* is not limited to child sexual offence proceedings.

Section 97A

Section 97A was introduced in response to the findings of the Royal Commission into Institutional Response to Child Sexual Abuse (Royal Commission). The Royal Commission considered that unnecessarily excluding tendency and coincidence evidence had led to unwarranted acquittals in prosecutions for child sexual abuse offences, and recommended legislative reform to address this issue.

The findings of the Royal Commission and contemporary evidence about child sexual offenders, suggest that such offenders do have particular tendencies but can engage in a wide variety of offending behaviour. In discussing the presumption of significant probative value under s97A, the Attorney General commented in the Second Reading Speech that:

This recognises the close connection between a tendency to have a sexual interest in a child or children and/or a tendency to act upon such an interest, and criminal proceedings 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 nature of such tendency evidence means that the link is significant, whether or not there are any unique similarities between the tendency evidence and the alleged conduct of the accused person in the proceedings—the link being sexual offending against a child or children.

Evidence of a sexual interest in a particular child is presumed to demonstrate or show that a person has a sexual interest in children generally. This particular interest distinguishes the type of offender in a way not necessarily applicable to offenders who commit sexual offences against adults.

With the limited exception of the similar age defence (s80AG *Crimes Act 1900*), children under the age of 16 are unable to consent to sexual activity. The policy issues considered by the Royal Commission relating to child sexual offence proceedings were necessarily very different to the policy issues around adult sexual offending. The latter generally focuses on consent and the statutory grounds of knowledge of consent. We do not consider it appropriate to expand the presumption created by s97A to adult sexual assault proceedings. Tendency evidence can still be admitted in adult sexual assault proceedings where its probative value outweighs the danger of unfair prejudice.

We trust these comments are of assistance.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Sonja Stewart
Chief Executive Officer