

Proposed reform to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings

Submission to the Council of Attorneys - General

26 April 2019

Rebekah Hitchenson, Senior Policy Officer
Crime Policy, Policy and Reform Branch
Justice Strategy and Policy, NSW Department of Justice
Level 3, Henry Deane Building, 20 Lee Street
Sydney NSW 2000
Email: rebekah.hitchenson@justice.nsw.gov.au

Contact: **Jennifer Windsor**
President, NSW Young Lawyers

Lauren Mendes
Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Nathan Johnston, Lauren Mendes and Kartini Saddington

The NSW Young Lawyers Criminal Law Committee (Committee) makes the following submission in response to the Proposal Paper, issued by the Council of Attorneys - General in relation to its proposed reform to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Criminal Law Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Submission

Amendments to the first and second limbs of the test

The Committee supports the retention of the first limb, and the proposed reform of the second limb, to the test for admissibility of tendency and coincidence evidence.

As noted in the proposal paper, the current test creates an asymmetry in the balancing act between probative value and unfair prejudice. The Committee therefore supports the proposed amendment to remove the word 'substantially' from the second limb of the test, and to require that the 'evidence have probative value' that 'outweighs the danger of unfair prejudice' to the accused. This would serve to focus the judge's mind on any *unfair* prejudice to the accused person. In the Committee's view, it is that portion of the test which should be the focal point.

The Committee submits that these amendments to the second limb would provide adequate protection to the accused whilst ensuring fairness to both the accused and the prosecution.

Targeted provision

Whilst the Committee recognises the seriousness of sexual offences against children, it does not support the insertion of a new provision to create a sub-category of tendency evidence which would be targeted towards the prosecution of such offences. While the Committee submits that a tendency to have a sexual interest in children and/or to act on that tendency is usually of significant probative value, there may be instances where this is not the case. The creation of such a strong presumption would likely have the effect of eroding the rights of the accused and restricts judicial discretion on questions of fact.

Joint trials

The Committee does not support a legislative presumption in favour of joint trials in circumstances where the prosecution seeks to lead tendency or coincidence evidence. Such a presumption has the potential to result in a situation where, despite tendency and coincidence evidence being found to be inadmissible, the accused are unable to rebut the presumption, resulting in a joint trial. This is undesirable.

In the experience of Committee members, where tendency or coincidence evidence has been ruled as admissible, a joint trial is inevitable. As such, this amendment is not necessary, despite its undoubted popular appeal.

Concoction, collusion or contamination

The Committee supports this amendment on the basis that it is in line with current authority from the High Court of Australia.

Standard of Proof - Beyond reasonable doubt

The Committee supports the introduction of a provision to explicitly provide that tendency or coincidence evidence about an accused is not required to be proved beyond a reasonable doubt. As noted in the proposal paper, this reform is consistent with current authority from the High Court of Australia and in particular the High Court's judgment in *Bauer*.

Improbability of similar lies

The Committee supports the introduction of a provision to clearly recognise the improbability of similar lies evidence as a form of coincidence evidence. The Committee regards the reform as practical and considers it to be common sense. The reform may also be simpler for juries to

understand and apply than tendency reasoning. As noted in the issues paper, and in the experience of our members, improbability of lies evidence is already commonly used in support of coincidence arguments to great effect. The legislative recognition of this type of evidence will prevent its misuse in tendency arguments and clarify the position for stakeholders.

Annexure A

The proposal included a tick box response sheet which the Committee has completed. The document forms part of this submission and is marked **Annexure A**.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:



Jennifer Windsor

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:



Lauren Mendes

Chair

NSW Young Lawyers Criminal Law Committee

Email: crimlaw.chair@younglawyers.com.au

Annexure A: Stakeholder response to proposed reform

Proposed reform to the test

	Strongly support	Support	Neutral	Oppose	Strongly oppose
First limb	✘				
New, targeted provision				✘	
Second limb	✘				

Supplementary reform proposals

	Strongly support	Support	Neutral	Oppose	Strongly oppose
Legislative presumption of joint trials where a defendant has been accused of multiple offences and the prosecution is seeking to lead tendency or coincidence evidence				✘	
The possibility of concoction, collusion or contamination should not be considered in the application of the test for admissibility of tendency or coincidence evidence		✘			
Provide that 'Tendency or coincidence evidence about a defendant in a child sexual offence prosecution should not be required to be proved beyond reasonable doubt'		✘			
Provide that coincidence evidence can cover 'improbability of lies' circumstances.		✘			
Exclude the application of principles or rules of the common law or equity that prevents or restricts the admission of evidence about propensity or similar fact evidence.			✘		