CLH;dgr

BAR ASSOCIATION OF QUEENSLAND

2 November 2016

Mr Philip Reed
Royal Commission into Institutional Responses
To Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

By email: criminaljustice@childabuseroyalcommission.gov.au

Dear Mr. Reed,

Re: Response to the Criminal Justice Consultation Paper published by the Royal Commission into Institutional Responses to Child Sexual Abuse

The Bar Association of Queensland (the Association) thanks the Royal Commission for the opportunity to comment on some of the important issues raised in the discussion paper. The Association has identified Chapters 9, 10, 11, 12, and 13 as being of particular interest to the work of its members, and provides specific comments on those chapters below.

In addition, the Association wishes to comment in relation to a number of statements made in the Executive summary, at pages 9 and 10.

While we note the reference to research identifying deficiencies with the criminal justice system's response to sexual offending generally, the experience of our members is that the majority of charges of this nature resolve by way of a guilty plea. If there is a trial, an acquittal is by no means the result, with many convictions resulting from trials which do go ahead. The Association notes the evidence before the Royal Commission of particular difficulties with securing convictions in cases of historical child sexual abuse but, respectfully, warns against extrapolating from that experience in order to recommend fundamental changes to the laws of evidence and the conduct of trials in all sexual cases.

Myths and misconceptions

The Association respectfully takes issue with the 'myths and misconceptions about sexual offences' identified at page 10. There are two points we wish to make in response to the list of four such myths and misconceptions listed on that page:

(a) The first is that it is the experience of our members that false complaints are, in fact, made. Occasionally, the conduct of the witness involved is considered to be so serious that perjury proceedings are brought. While this is a rare occurrence, the bringing of that charge and the seriousness with which it is treated on sentence underlines the inherent danger of serious miscarriages of justice occurring when false testimony is given.

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

To dismiss as myth or misconception the potential for lies to be told by women and children in sexual abuse cases is to suggest that there is a particular class of witness who, in a particular class of case, should always be believed. This is, in our view, as concerning as a presumption against the truthfulness of a particular class of witness, and would seriously erode the presumption of innocence.

In the experience of our members, in reality the accused individual in a case involving allegations of sexual abuse of a child is typically confronted with the obstacle of an understandable assumption on the part of members of the community that children would not, readily, make such things up.

(b) The second point is that the remaining myths and misconceptions are not, in contemporary trial practice, matters which escape judicial comment and intervention when defence counsel attempt to rely on them. Doctors who have examined complainants are careful to note that the absence of 'medical evidence' of penetration is in many cases is completely neutral in terms of corroborating or throwing doubt on the evidence of the complainant. Defence counsel attempting to inappropriately exploit that evidence (or, indeed, evidence of an absence of complaint or avoidance of the abuser) risk eliciting unfavourable comments either during their cross-examination or the judge's summing up, as well as potentially alienating a jury. On the other hand, they should not shy away from exploring this issue if it is relevant and of assistance to the defence. Community attitudes towards sexual offending have undergone a major transformation over recent decades and the jury's assessment of the complainant's evidence and actions is informed by those changes.

Chapter 9 – Evidence of victims and survivors

Intermediaries

The Association notes the emergence of the role of intermediaries for certain complainants during the investigation and trial process and will look with interest at the experience of the trial of such a scheme in New South Wales. We would caution against recommending that similar measures be implemented across the board before that trial has been in place for some time and has been properly assessed and scrutinised.

In Queensland, the approach of the courts has been very cautious when it comes to the role of the support persons, as allowed by s21AV of the *Evidence Act* 1977 (Qld). Retrials have been ordered in a number of cases in which it was found that trial judges had not directed the jury as to the role of that person and against inferring anything as a result of their presence.

The introduction of an individual (such as an intermediary) who has a much more significant, active role in assisting the complainant give their evidence both during their recorded interview with Police and later in court is a significant change to the existing practice.

It is the role of the trial judge to ensure that questioning of witnesses is conducted fairly. It remains the view of the Association that any alteration of the present position should be attended by great care and should be pursued only if very strong evidence supports any such proposed alteration.

Ground rules hearings

The idea of "ground rules hearings" held ahead of the cross-examination of complainants in order to clearly delineate allowed lines of questioning is difficult to reconcile with the right of the defence not to disclose their case prior to the commencement of trial.

Again, it is the role of the trial judge during the cross-examination of complainants to ensure that counsel confine themselves to relevant, allowable lines of questioning and both prosecution and defence can make applications to exclude portions of the recording if impermissible questioning has taken place.

The Association, respectfully, notes the comments made about the role of cross-examination by the High Court in *Wakeley and Barting v The Queen* [1990] HCA 23; 64 ALJR 321; 93 ALR 79 at paragraph 20.

Chapter 10 – Tendency and coincidence evidence

As identified in the discussion paper, Queensland is the only State where the admission of similar fact (coincidence) or propensity (tendency) evidence is governed by the common law, with some statutory limitation.

The Bar Association of Queensland does not accept the proposition that the rules of admissibility and joinder should be amended to make it easier for such evidence to be admitted, or allow for more joint trials, whether in cases of child sex offences or otherwise.

Our system of criminal justice is offence based. That is to say, it depends upon identifying specific behaviour of the offender. Prosecuting authorities formulate a charge or charges based upon the specific act or acts of the offender. Proof of the charge or charges then relies upon evidence being sufficient to satisfy a tribunal of fact (usually a jury), beyond reasonable doubt, that the conduct in question occurred. There is no basis to convict a defendant of any offence unless the conduct in question is so proved.

In particular, defendants cannot be convicted of an offence simply because it is proved they are of bad character or have a tendency to commit particular types of offences.

Child sex offences are no different. The usual contest where such charges are defended concerns whether or not the acts alleged occurred at all. For that reason, reliability of the victim's account is central to the question of proof. Reliability usually involves consideration of consistency of account and clarity of detail. Accordingly, acquittal in a case where the jury, although satisfied beyond reasonable doubt a child was a truthful historian, were not satisfied beyond reasonable doubt that a particular act or acts occurred, presents no inconsistency of logic or reasoning, no legal inconsistency and no miscarriage of justice. On the contrary, to return a verdict of guilty in such a case, because the jury were satisfied the defendant was a paedophile, would be a clear miscarriage of justice.

Proof that a defendant has, at some other time, committed a similar offence or offences to that charged will not usually assist in determining whether a specific allegation is true, unless the other conduct somehow logically confirms, or tends to confirm, the offence charged. An example will be where the conduct is "strikingly similar" or has "hallmark" characteristics, etc. This is of course the very basis of the long history of the development of the law relating to the admission of similar fact or propensity evidence. Likewise,

allowing joint trials of child sex offences where the evidence is not cross-admissible has long been recognised to produce prejudice, dangerous to the concept of a fair trial.

It is worth highlighting some of the many statements of principle which underlie these rules and the reasons for them. As acknowledged in the discussion paper,[1] these statements have been made over a long period of time and in strong terms. The discussion paper[2] quotes from *Hoch v The Queen* as follows:[3]

> *the criterion of its admissibility is the strength of its probative force ... That strength lies in the fact that the evidence reveals 'striking similarities, 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.*

In *Pfennig v The Queen*, Mason CJ, Deane and Dawson JJ expressly accepted that *Hoch* correctly stated the law.[4] They went on to say:[5]

> *There has been a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they each raise the same considerations in terms of admission into evidence. The difficulty is that their probative value varies not only as between themselves but also in relation to the circumstances of particular cases. Thus, evidence of mere propensity, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connection with or relation to the issues for decision in the subject case.*

Their Honours explained the justification for excluding evidence which did not have relevance to the offence charged. They said:[6]

> *That is because, as a matter of policy, the courts have taken the view that propensity evidence if it does no more is likely to have a very prejudicial effect and should not be received unless its probative force exceeds that prejudicial effect. So the evidence of propensity needs to have a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.*

In *Phillips v The Queen*, the Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) restated these considerations as follows:[7]

> *The "admission of similar fact evidence ... is exceptional and requires a strong degree of probative force. It must have "a really material bearing on the issues to be decided". It is only admissible where its probative force "clearly transcends its merely prejudicial effect". "[I]ts probative value must be sufficiently high; it*

---

[1] At p.416.
[2] At p.392.
[3] (1988) 165 CLR 292 at 294-295.
[4] (1995) 182 CLR 461 at 483.
[5] *Pfennig* at 483.
[6] *Pfennig* at 484-485.
[7] [2006] 225 CLR 303 at 320-321.

> *is not enough that the evidence merely has some probative value of the requisite kind." The criterion of admissibility for similar fact evidence is "the strength of its probative force. It is necessary to find "a sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence. The probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused". Admissible similar fact evidence must have "some specific connexion with or relation to the issues for decision in the subject case". As explained in Pfennig v The Queen:*
>
> > *"[T]he evidence of propensity needs to have a specific connexion with the commission of the offence charged, a connexion which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it."* (Citations removed.)

In *De Jesus v The Queen*, Gibbs CJ quoted from this own judgement in *Sutton v The Queen*[8] as follows[9]:

> *In that case I said, at p.531:*
>
> > *Before us it was accepted by counsel for the prosecution that where an accused is charged with a number of sexual offences, the charges should not be tried together if the evidence on one count is not admissible on another count. That was the view taken by the majority of the House of Lords in*
> >
> > *Director of Public Prosecutions v. Boardman and it is a view consonant with justice*

His Honour then quoted with agreement from the judgement of Brennan J, also in *Sutton*, as follows:[10]

> *When two or more counts constituting a series of offences of a similar character are joined in the same information, a real risk of prejudice to an accused person may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences.*

In *De Jesus*, Gibbs CJ concluded[11]:

> *Since the evidence on one count was inadmissible on the other, Sutton v. The Queen required it to be held that the two rapes should not have been joined in the one indictment. There can be no doubt that the joinder was highly prejudicial to the applicant - indeed, it seems to me that in this case, where the applicant was raising an issue of identity in one case and an issue of consent in the other, the jury would inevitably have been influenced by the fact that the offences were tried together to find against the applicant on both issues.*

The relevant provisions of the Uniform Evidence Act permitting the admission of tendency and coincidence evidence, albeit, on condition that the probative value must substantially outweigh any prejudicial effect, constituted a deliberate move to depart from the long-established rules restricting introduction of such evidence. Obviously, the

---

[8] *Sutton v The Queen* (1984) 152 CLR 528 at 531.
[9] (1986) 68 ALR 1 at 4.
[10] *De Jesus* at 4.
[11] *De Jesus* at 5.

West Australian and English provisions go further in liberalising the admissibility of such evidence.

The Commission argues that the results of the jury reasoning research offer strong support for the view that the long held fears of prejudice to defendants from the admission of tendency evidence, or of allowing joint trials, is unfounded. We respectfully disagree. To the contrary, we contend that the results of the research demonstrate the opposite.

The results shown in the discussion paper at Figure 10.1[12] record the conviction rates for the four different trial types. The trial types were:

(a) separate trial (where only a single complainant gave evidence)
(b) relationship evidence (where a single complainant gave evidence but also gave evidence of uncharged acts)
(c) tendency evidence (where the charge related only to a single complainant but evidence of other alleged victims was admitted), and
(d) joint trial (where multiple charges relating to different complainants were tried together).[13]

The results are recorded for the different types of offences, namely, non-penetrative offences and penetrative offences.

The results demonstrate that, where the jury considered only the evidence of the complainant, i.e., in the separate trial and relationship evidence trial, the conviction rates were low, namely: 11% (non-penetrative) and 0% (penetrative) in the separate trial; and 8% (non-penetrative) and 0% (penetrative) in the relationship evidence trial. The inescapable conclusion is that this resulted because of focus upon whether specific acts were proved beyond reasonable doubt.

By contrast, the conviction rates in cases where the jury heard evidence of the allegations of other complainants was high: 63% (non-penetrative) and 63% (penetrative) in the tendency

In the tendency evidence trial, the charges considered by the jury remained the same as for the separate trial and relationship evidence trial. The tendency evidence (of similar conduct against two other boys) was not capable of proving the specific acts charged. The juries were instructed they could only use that evidence, if accepted, to reason that the defendant had a tendency to have a sexual interest in young boys, had a tendency to engage in sexual activity with young boys, and had a tendency to use his position of authority to access young boys in order to engage in sexual activity with them.[14]

The inescapable conclusion is that the higher conviction rate was influenced by the other similar allegations led in evidence. Not unexpectedly, the conviction rates in the joint trials were similar. It is our view these results vindicate the fears of unfair prejudice to defendants expressed in the examples from the High Court set out above.

The discussion paper records the view of the researchers that the jury verdicts were logically related to the probative value of the evidence, that, as the inculpatory evidence was increased, conviction rates did too, that the credibility of complainants was enhanced by evidence from independent witnesses, and that little evidence was found that verdicts

---

[12] Discussion paper at p.420; Jury reasoning research report Table 6 at p.111.
[13] Jury reasoning research report at p.76.
[14] Jury reasoning research report at p.155.

were based on impermissible or prejudicial jury reasoning.[15] The additional evidence referred to was of course the evidence of other similar complaints against other complainants. As explained above, it is our view that, where none of the additional evidence could logically help prove the specific acts alleged by other complainants, it was simply the tendency reasoning which drove the convictions. That is, because they believed the defendant to be sexually attracted to boys, they were prepared to find specific acts were proved whereas, without knowledge of that attraction, the same allegations were not proved.

The rule requiring separate trials where evidence is not cross-admissible (as per *Sutton* and *De Jesus*) was premised on the notion that juries could not be expected to apply a direction to ignore the prejudicial evidence when considering guilt on a specific charge. The traditional safeguards were designed in light of the prospect of the jury doing so, subconsciously.

It is the experience of our members that convictions in cases of alleged child sexual abuse have increased significantly. Much has been done, administratively, to improve the fairness of trials for complainants in child sex cases.[16] A primary focus of the administration of justice has been to ensure a fair trial for a defendant. Where a defendant is charged with child sex offences, attainment of that goal is increasingly more difficult. It is our view that liberalisation of rules relating to admission of evidence in such cases, and allowing joint trials where evidence is not cross-admissible, prejudices the rights of defendants to a fair trial. Our view is that this will likely result in more defendants being convicted, not because of what they have properly been proved to have done, but because they are of bad character or believed to have a criminal tendency.

The discussion paper suggests that liberalisation of these rules has so far not shown any evidence of an increased risk of miscarriage of justice.[17] We respectfully suggest no such conclusion should be drawn. Where a defendant had information or evidence to show he was the subject of untrue allegations, presumably, he would utilise that evidence at his trial to secure an acquittal. Where he has no evidence of that apart from his own knowledge, there is little scope for anything beyond his appeal against conviction, which is determined upon the evidence adduced at trial. Indeed, we wonder what evidence of an untrue allegation a defendant is, in reality, ever likely to be able to assemble.

Chapter 11 – Judicial directions and informing juries

Similarly to the comments made in relation to the preceding chapter of the discussion paper, the Association notes that the law with respect to judicial warnings given in trials involving sexual offences is the product of lengthy and exhaustive litigation and consideration by our highest courts of the issues which go to the heart of ensuring the fairness of those trials. The question as to whether particular judicial directions should be abolished or reformed would need to be answered by an assessment in respect of each.

The *Markuleski* direction, for example, provides a mechanism which is designed to ensure consistency of verdicts and is based on common sense.

The *Longman* direction reflects the difficulties faced by defendants in historical matters where the passage of time leaves memories depleted, potential witnesses deceased and

[15] Discussion paper at p.421.
[16] These measures include recording of initial complaints by police, restriction of children being called at committals, utilising police recordings as the child's evidence at trial, pre-recording of children's evidence at trial, use of remote rooms for giving evidence, use of support persons, etc.
[17] Discussion paper at p.447.

physical evidence (e.g. diaries, photographs, work records) long lost. While the Association accepts that many of the victims who have given evidence to the Royal Commission face similar difficulties, this does not negate the potential for miscarriages of justice should the current protections be removed.

The Association supports the importance of the discretion vested in the trial judge and would caution against the limiting of the various directions open to them without serious consideration.

Chapter 12 - Sentencing

Good character

It is the experience of our members that previous good character is not generally accepted as a significant mitigating factor on sentence in cases involving the sexual abuse of children, or offences involving child exploitation material. Indeed, it has often been stated by our Court of Appeal that the absence of criminal history is not unusual in such cases and cannot be accepted as having anything more than limited weight as a mitigating feature or as evidence supporting prospects of rehabilitation. The use of good character and position to abuse children is clearly regarded as a breach of trust and, as such, a significant aggravating factor in sentencing.

It is the view of the Association that the concerns raised about the reliance on good character in the discussion paper do not apply in Queensland given the approach of sentencing and appellate courts.

Cumulative sentences

With respect to the discussion relating to a presumption in favour of cumulative sentencing for child sexual abuse offences, the Association notes that there is provision in the *Penalties and Sentences Act* 1990 (Qld) for the imposition of cumulative sentences.

The discretion as to the cases in which this should occur should remain that of the sentencing judge.

In cases involving serious, recidivist child sex offenders, there are two additional legislative regimes in Queensland which have significant impact both at sentence and post-sentence.

An offender charged with a second or repeat serious child sex offence is liable to mandatory life imprisonment pursuant to s161E of the *Penalties and Sentences Act* 1990 (Qld). In addition to that provision there is the post-sentence regime imposed by the *Dangerous Prisoner (Sexual Offenders) Act* 2003 (Qld), which extends the period of supervision and control of certain offenders well beyond the limits of their original sentences.

Historical sentencing standards

At page 509, the Consultation Paper asserts that the decision of *Radenkovic v The Queen* is authority, albeit, *obiter dictum*, for the proposition that sentencing courts ought to "impose a sentence commensurate with the maximum sentence and applicable standards of the time". This observation is made in the context of discussing contemporary sentencing for historical sexual offences.

It is further asserted that this approach has been adopted in Queensland and, with qualifications, in the Northern Territory.

The Association submits, with respect, that the authors of the Discussion Paper have misapprehended the impact of *Radenkovic*. The High Court's decision in that case was handed down in very particular circumstances. The NSW legislature had, at the time, recently enacted entirely new sentencing legislation. The Crown had appealed a sentence imposed under the old legislation. The appeal was successful and the issue in question was whether the re-sentencing process ought to be carried out in accordance with the new legislation or the legislation in place when the original sentence was imposed. It was determined that the re-sentence ought to be determined, for reasons of fairness, in accordance with the sentencing processes and considerations applicable at the time of sentence.

This is not in keeping with the approach of Queensland courts to the sentencing of offenders convicted of historical child sex offences. Section 9 of the *Penalties and Sentences Act 1992* (Qld) has been amended many times since its original enactment. In 2003 the Queensland government amended s.9 *Penalties and Sentences Act 1992* to include subs.(5) and (6) which changed the governing principles for sentencing offenders convicted of child sexual offences. Again, in 2010, the parliament amended s.9 to make it clear that, when sentencing an offender for an offence of a sexual nature committed against a child under 16 years, the offender must serve an actual term of imprisonment unless exceptional circumstances exist.

The amendments to s.9 have been held to apply to offences committed prior to their enactment (see, for example, *R v Carlton* [2009] QCA 241 and *R v Pham* [2009] 242). In short, the legislature has been able to ensure that contemporary attitudes to child sexual offending are applied by courts sentencing for historical offences.

The question of the application of the maximum penalties at the time of offending is separate. The Association, for reasons of procedural fairness and natural justice, strongly opposes any suggestion that the maximum penalty for any offence ought to be retrospectively increased.

Chapter 13 - Appeals

Interlocutory appeals

The current ability of the Director to take a reference on a point of law (with the consent of the Attorney-General) is a right which can be exercised at any time.

It is the view of the Association that any expansion of the right to bring an interlocutory appeal in criminal proceedings would lead to a lengthening of proceedings, detracting from certainty for both the accused and the complainant.

The right, if so expanded, could only sensibly be granted to prosecution and defence, and would lead to a substantially increased burden on our trial and appellate courts.

Yours faithfully,

Christopher Hughes QC
President