Law Council
OF AUSTRALIA

Criminal Justice

Royal Commission into Institutional Responses to Child Sexual Abuse

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc.
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc.
- Western Australian Bar Association

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee, its Business Law Section's Privacy Law Committee, the New South Wales Bar Association and the Law Institute of Victoria in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide this submission to the Royal Commission into Institutional Responses to Child Sexual Abuse in Australia (**the Royal Commission**). This submission addresses the Consultation Paper on Criminal Justice (**the Consultation Paper**).[1]

2. The Law Council notes that the 707 page Consultation Paper was issued on 5 September 2016 and that comments were requested by 17 October 2016. The Law Council is still concerned by the short time frame for comments on the Consultation Paper and for the proposed reforms of the criminal justice system.

3. In the period available for comment on the Consultation Paper, the Law Council has only been able to provide its views on certain issues.

4. The Law Council acknowledges that it is critical that survivors of sexual abuse are able to seek and obtain a criminal justice response to child sexual abuse. It is also vital that the criminal justice response adheres to fundamental rule of law and criminal justice principles. The Law Council's submission is based on these principles.

5. Key points arising from this submission include:

    - The retrospective persistent sexual exploitation of a child offence in South Australia and maintaining a sexual relationship with a young person offence in Tasmania are not appropriate;

    - The requirement for particulars of criminal offences should not be restricted any further than it already is;

    - A new offence of failing to disclose a sexual offence committed against a child should be enacted;

    - Reasonable suspicion may be a more appropriate standard for mandatory reporting, although this should not include vague or uncertain information, such as rumours and the like;

    - There should be greater oversight of prosecutorial decisions;

    - The pre-recording of all of a witness's evidence is a beneficial special measure, and provision for its use should be extended, particularly in relation to cases of child sexual abuse;

    - The Commission should call on the Commonwealth Government to refer to the Australian Law Reform Commission (**ALRC**) a review of the law relating to tendency and coincidence evidence;

    - Neither the Western Australian approach nor the approach in England and Wales to tendency and coincidence evidence should be adopted;

    - The law relating to the giving of directions to juries in criminal trials is in need of review and should be referred to the ALRC;

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016).

- Legislation excluding good character as a mitigating factor in sentencing for child sexual abuse offences should not be enacted;

- There should be no statutory presumption in favour of cumulative sentences for child sexual abuse offences;

- Offenders should be sentenced on the basis of the penalties applicable at the time of the commission of the offence;

- If being on the sex offender's register gives rise to disqualification from the Working with Children Checks regime, then an exception should be carved out for persons under the age of 18 to bring the interaction between the Working with Children Checks regime and the sex offender's regime in line with the Royal Commission's recommended age exemption;

- The Royal Commission should specifically consider the current risk assessment methodologies in relation to high-risk sex offenders with a view to assessing their validity, rigour and predictive power; and

- The age of criminal responsibility should be increased from 10 to 12 years of age but the current *doli incapax* doctrine should remain unchanged.

Chapter 2: Proposed Approach to Criminal Justice Reforms

6. The Law Council agrees with the Royal Commission's assessment as to why a criminal justice response is important. However, the Law Council does not agree with all of the Royal Commission's proposed criminal justice reforms. In the time available for providing a response to the Royal Commission's Consultation Paper, this submission raises concerns in relation to some of these proposed reforms.

Chapter 4: Police Responses and Institutions

Privacy and Defamation Issues

7. The privacy issues are adequately covered in the Consultation Paper by the feedback provided by the NSW Privacy Commissioner, Dr Elizabeth Coombes, and Mr Jason Suidgeest, Director of the Regulation and Strategy Branch of the Office of the Australian Information Commissioner. Provided reporting data is properly secured (including internal access controls) and release of information takes place within the confines of the criminal justice process, including proper due process, both privacy and defamation can be addressed.

8. As suggested by feedback from Mr Suidgeest, privacy and potential defamation issues arise in the course of premature and inappropriate disclosure as articulated in the social media example provided in the Consultation Paper.

Chapter 5: Child Sexual Abuse Offences

Persistent Child Sexual Abuse Offences

Is retrospective operation of the offences – as currently allowed in South Australia and Tasmania – appropriate?

9. The Law Council recognises the inherent difficulties in charging repeated but largely indistinguishable occasions of child sexual abuse and welcomes efforts to ensure that such occasions of child sexual abuse can be effectively prosecuted. These efforts – such as new charges of persistent child sexual abuse and the 'course of conduct' charge in Victoria – should be balanced with a number of rule of law principles and fundamental rights.

10. The Law Council's starting point on this issue is its Rule of Law principles. Principle 1(a) provides that:

> *Legislative provisions which create criminal or civil penalties should not be retrospective in their operation*.[2]

11. The basis of the principle against retrospectivity is well-settled and longstanding (as is the principle itself).[3] That said, it has long been recognised that legislatures have the

[2] Law Council of Australia, *Rule of Law Principles* (March 2011) 2.
[3] See for example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 [608]; *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20 [48].

power to enact criminal laws with retrospective effect.[4] The Law Council has previously taken the position that retrospective laws should only be used in exceptional circumstances, where the benefits of doing so heavily outweigh the costs.[5]

12. The 'persistent sexual exploitation of a child' offence in South Australia[6] and 'maintaining a sexual relationship with a young person' offence in Tasmania[7] operate retrospectively. It is noted that these offences do not operate to criminalise conduct that a person was free to engage in prior to the enactment of the offences: sexual offences against children were always criminalised (though, of course, the form and scope of those offences has evolved over time) and there is no sense in which a person's legal obligations have changed by virtue of these offences. Accordingly, any injustice that may be occasioned by a person engaging in conduct on the basis that that conduct is legal and then having that conduct criminalised after the fact does not arise in this case. Moreover, while being sentenced for these retrospective offences triggers eligibility for inclusion on the sex offender's register, it is noted that the sex offender register regimes 'back capture' historical offences in any event.[8]

13. However, despite the content of the offence not giving rise to injustice or unfairness, the Law Council notes that the maximum penalty under the South Australian provision is life imprisonment. Accordingly, there is a disproportionate and very real shift in the consequences that flow from a conviction under this provision—as opposed to a historical provision under which a person would otherwise be charged—and it is here that the unfairness may arise. This is particularly so given that, as the Royal Commission noted in the Criminal Justice Consultation Paper, 'the South Australian Court of Criminal Appeal has found that the *actus reus* of the offence remains the committing of the (two) offences and that a conviction requires the jury's agreement as to which offences constitute the offence.'[9] It is unclear why, for example, a person recently prosecuted and convicted of two separate offences of indecent assault against an eleven year old that occurred in 1991 should be subject to a maximum penalty of 10 years imprisonment for each offence while, if that person was recently prosecuted and convicted under the retrospective provision for exactly the same conduct, life imprisonment is the maximum penalty. In the Law Council's view, an offender should be sentenced on the basis of the penalties as they stood at the time of the commission of the offence. The retrospective South Australian provision does not allow for this.

14. The better approach is the Victorian 'course of conduct' charge.[10] This not only addresses the difficulties in prosecuting repeated but largely indistinguishable instances of child sexual abuse, but also allows for a more just and appropriate sentencing exercise. Subsection 5(2F) of the *Sentencing Act 1991* (Vic) provides that:

> *In sentencing an offender for the incidents of the commission of an offence included in a course of conduct charge (within the meaning of clause 4A of Schedule 1 to the Criminal Procedure Act 2009) a court—*

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[4] See for example, *R v Kidman* (1915) 20 CLR 425; *Millner v Raith* (1942) 66 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 [721] (McHugh J).
[5] Law Council of Australia, Submission to Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, March 2015, 19.
[6] *Criminal Law Consolidation Act 1935* (SA) s 50.
[7] *Criminal Code Act 1924* (Tas) s 125A.
[8] *Child Sex Offenders Registration Act 2006* (SA) para 6(1)(a), sch 1 pt 2(ea); *Community Protection (Offender Reporting) Act 2005* (Tas) ss5, 12, and sch 2.
[9] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 187.
[10] *Criminal Procedure Act 2009* (Vic) sch 1 item 4A.

(a) must impose a sentence that reflects the totality of the offending that constitutes the course of conduct; and

(b) must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence.

15. It will readily be seen that the difficulties in the South Australian approach do not arise in the Victorian context. Retrospective 'procedural' amendments such as Victoria's are to be preferred to substantive criminal offences that operate retrospectively.

Can the requirement for particulars be further restricted without causing unfairness to the accused?

16. The Law Council notes the decision of *KRM v The Queen*[11] at 227 per McHugh J:

> *Subject to the operation of Ch III of the Constitution, the legislature of the State of Victoria may modify – even abolish – the need for particulars of criminal charges. But an intention to do so should be imputed to the legislature only when it has enacted words that make its intention unmistakably clear. Courts should not lightly infer that a legislature has intended to abolish or modify fundamental principles of the common law such as the principle that an accused person must have a fair opportunity to defend a criminal charge.*

17. Queensland has modified the need for particulars under section 229B of the *Criminal Code 1899* (Qld),[12] as has Victoria under its 'course of conduct' provision.[13] However, the fact that the legislature can modify or even remove the requirement for particulars is no answer to the question of whether and to what extent the legislature *should* take such a course.

18. In the Law Council's view, restricting the requirement for particulars must be approached with great care and caution. The approach taken in Queensland, for example, may be appropriate noting that the gravamen of the offence is the 'unlawful sexual relationship' and not the constituent acts that are relied upon to prove that relationship. The prosecution must still properly particularise the *actus reus* of the offence, subject to the relaxed requirements for particulars of the constituent acts. An unfair trial may result if the prosecution fails to do so:

> *…default or impropriety on the part of the prosecution in pre-trial procedures can, depending on the circumstances, be so prejudicial to an accused that the trial itself is made an unfair one. One example is where particulars supplied to an accused have been so inadequate and misleading that an accused has been denied a proper opportunity of preparing his defence*.[14]

19. It is suggested that the scope of the Queensland provision ought to be the outer limit when it comes to restricting particulars: any further restriction and injustice may result. The *actus reus* of the offence must always be adequately particularised, whatever the status of any series of acts that may constitute it. Further, the abolition of the requirement for particulars, while theoretically open, should never be taken up. Limitation of the requirement for particulars may be appropriate in some limited circumstances but doing away with particulars entirely would result in grave unfairness.

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[11] *KRM v The Queen* (2001) 206 CLR 221.
[12] *Criminal Code 1899* (Qld) paras 229B(4)(a) - (b).
[13] *Criminal Procedure Act 2009* (Vic) sch 1 item 4A.
[14] *Jago v District Court (NSW)* (1989) 168 CLR 23 [59] (Deane J).

Broader grooming offences (Qld and Vic)

20. The Law Council sees no difficulties as a matter of principle with the current Victorian[15] or Queensland[16] approaches to 'grooming' offences. Grooming behaviour encompasses a wide range of conduct, from the otherwise innocent to the overtly sexual. Setting aside the issue of grooming of third parties, it is noted that the Queensland provision is broader than the Victorian provision in that the Queensland offence covers 'any *conduct'* in relation to a person under the age of 16 while the Victorian provision only criminalises '*communication* by words or conduct.' Further, the *mens rea* for the Queensland offence ('with intent to facilitate the procurement of the person to engage in a sexual act') is wider in scope than the Victorian offence ('with the intent of facilitating the child's engagement in or involvement in a sexual offence with that person or another adult').

21. In relation to the criminalisation of grooming of third parties in Victoria, the Law Council has no issue in principle with this provision. The key element in grooming offences is the mental element; it is this that distinguishes otherwise innocent behaviour from criminal behaviour. While the Law Council is not aware of any proposals to alter the requisite mental element, intention must always remain the mental element for grooming offences; recklessness would be too low a bar.

Position of authority offences

22. The Law Council is not aware of any gaps in relation to relationships of authority as aggravating factors in child sexual abuse offences.

23. The two approaches in relation to 'position of authority' offences involve criminalising sexual conduct between a person aged 16-17 and a person in a position of authority or care (e.g. step-parent, foster parent, teacher, counsellors, etc.) or not criminalising such conduct per se but allowing the exercise of a position of authority to vitiate consent.

Chapter 6: Third Party Offences – Failure to report & offences by institutions

Scope of mandatory reporting

24. The Law Council and Law Institute of Victoria (**LIV**) support the creation of a new criminal offence of failure to disclose a sexual offence committed against a child. In its 2012 submission to the *Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations*, the LIV recommended a model that required religious personnel to report to police a reasonable suspicion that a minor is being, or has been physically or sexually abused by an individual within a religious or spiritual organisation.

[15] *Crimes Act 1958* (Vic) sub-s 49B(2).
[16] *Criminal Code 1899* (Qld) sub-s 218B(1).

25. In 2014, following the recommendations in the Betrayal of Trust report,[17] the Victorian Government introduced a failure to disclose offence under the *Crimes Act 2010* (Vic).[18] Section 327 of the *Crimes Act* states:

> *[A] person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a police officer as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.*

26. The Law Council and LIV do not oppose mandatory reporting requirements that are broader than the LIV's recommendation in its 2012 submission and note that the LIV welcomed the Victorian provision that encompassed all child sexual abuse. However, the Law Council and LIV raise the question of whether or not reasonable belief puts the matter too high and suggests that reasonable suspicion may be a more appropriate standard, although this should not include vague or uncertain information, such as rumours and the like.

Balance competing considerations

27. If contrary to the above, it were considered necessary to include an exception for religious confessions, it should allow for a balancing of the need for confidentiality against the need for disclosure.

28. In the lead up to amending Victoria's evidence law to ensure uniformity across jurisdictions, the ALRC recommended a broad 'confidential relationships privilege' which would include conversations between cleric and a member of the church. The confidential relationships privilege would allow a 'court to consider all the circumstances in which the communication was made, and balance the need for confidentiality against the need for disclosure.' [19]

29. Unfortunately the Victorian Parliament decided not to adopt the confidential relationships privilege proposed by the ALRC and instead decided on different privileges, including religious confessions. The Law Council and LIV submit that the discretionary balancing test would be much fairer than an absolute exemption for religious confessions.

Would a criminal offence designed to protect whistleblowers who disclose institutional child sexual abuse from detrimental action encourage reporting?

30. The LIV recommended that a legislative regime be established to encourage or facilitate reporting to police by adult victims and other people with information about the commission of criminal abuse of children by providing protections from reprisals and defamation actions for any disclosures made pursuant to the proposed mandatory reporting requirements, or under the failure to disclose offences under the *Crimes Act*. Since the LIV made this submission, the *Protected Disclosure Act 2012* (Vic)

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[17] Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations* (2013).
[18] *Crimes Act 2010* (Vic) s 327.
[19] Australian Law Reform Commission, *The Final Report - Uniform Evidence Law*, Report No 102 (2005) [15.86].

superseded the *Whistleblower Protection Act 2011* (Vic) and includes protections from reprisals and defamation.

31. Similar protections should be available in other states and territories where they are not already available.

Chapter 7: Issues in prosecution responses

Complaints and Oversight Mechanisms

32. The Royal Commission has noted that the introduction of a Director of Public Prosecutions (**DPP**) complaints or oversight mechanism may be beneficial, including in terms of:

    - improving the decision-making of Australian DPPs and their offices;
    - improving public confidence in that decision-making; and
    - providing victims and survivors with avenues to seek review of decisions with which they do not agree.[20]

33. As noted in Christopher Corns, 'Public Prosecutions in Australia: Law Policy and Practice':

    > *A defining feature of public prosecutions in Australia, compared to prosecutions in many other countries, is the central role of individual discretion of prosecutors…However, because of the subjectivity inherent in discretionary decision-making, it is important that adequate accountability mechanisms are in place to provide a check or review of such decisions.*[21]

34. Noting that oversight and review encourage better decision-making and provide important avenues for those affected by administrative decisions to challenge those decisions,[22] the Royal Commission has suggested that at a minimum, complaints or oversight mechanisms should be established to enable:

    (a) individual complainants to challenge or seek review of decisions, particularly where the prosecutor decides not to prosecute or to withdraw the prosecution in relation to that complainant; and

    (b) ongoing oversight of compliance with prosecution guidelines and policies.

35. Currently, the various Acts establishing Australian DPPs contain a number of measures relevant to accountability,[23] however these measures do not go far enough.

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[20] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 294.
[21] Christopher Corn, *Public Prosecutions in Australia: Law Policy and Practice*, (Thomson Reuters, 2014) 11.
[22] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 309.
[23] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 308. For example General statement of responsibility to the Attorney-General; Attorney-General's power to direct or request; Consultation; Directions and guidelines; Attorney-General's exercise of powers prevails over DPP's; Annual reporting obligation; and Director's Committee.

36. Accordingly, the Law Council supports the Royal Commission's proposal, that all Australian DPPs should implement the following measures, if they are not already in place:

    - adopt comprehensive written policies for decision-making and consultation with victims and police;
    - publish all policies online and ensure that they are publicly available;
    - provide a right for complainants to seek written reasons for key decisions;[24]
    - formalise complaints mechanisms, with written responses; and
    - provide a right for victims to seek an internal merits review of key decisions, particularly in relation to not commencing or discontinuing a prosecution.[25]

37. As noted by the Royal Commission, the right of a victim to seek internal merits review of key decisions has been well established in the United Kingdom, with the formation of the 'Victims Right to Review Scheme' in 2013, following the UK Court of Appeal decision in *R v Christopher Killick*.[26] The scheme gives victims the right to request a review of a decision not to prosecute or to terminate criminal proceedings.

38. As noted by the Royal Commission, discussion of complaints and oversight mechanisms in relation to DPPs inevitably raises concerns about the impact of any mechanism on the independence of the DPPs,[27] however the proposed measures appear to appropriately address issues of accountability without threatening the independence of the DPP.

Chapter 9: Evidence of victims and survivors

39. The Royal Commission notes that special measures are generally an effective way of reducing the complainant's stress when giving evidence, which in turn improves the reliability of the complainant's evidence without compromising the fairness of the proceedings to the accused.[28]

40. The Royal Commission noted that a number of possible reforms have emerged that may make a significant difference to the way that vulnerable witnesses give their evidence.[29] In particular, it noted that the priority for improvement appears to be extending the provision for prerecording the complainant's full evidence.[30]

41. According to Cashmore's 'Innovative Procedures for Child Witnesses', pre-recording has the following benefits:[31]

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[24] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 311.
[25] Ibid 313.
[26] *R v Christopher Killick* [2011] EWCA Crim 1608.
[27] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 306.
[28] Ibid 362.
[29] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 379.
[30] Ibid 383.
[31] J. Cashmore, 'Innovative Procedures for Child Witnesses', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 213.

- *It allows a child to get on with life sooner, including participating in therapy without the risk of contamination;*

- *There is less waiting time at court because other aspects of the trial are handled separately;*

- *The pre-recorded evidence can be used in the event of a re-trial, thus preventing the child having to give evidence several times;*

- *The evidence is likely to be more reliable as there is less of a gap between the original incident and the giving of evidence;*

- *The tape can be edited to remove parts of the evidence ruled inadmissible; and*

- *Both parties know the strength of the child's evidence well before trial. The prosecution can determine whether the evidence justifies proceeding with the charges. The defence can decide whether a change of plea is warranted.*

42. The benefits of the prerecording of all of a witness's evidence were highlighted in the consultation paper, with the Royal Commission also noting the following additional benefits to pre-recording:

    - *as objections, judicial interventions and inappropriate questions can be edited out of the final recording to be shown to the jury, the prerecording process may be better controlled by the judge; and*

    - *preparing for the recording, and the evidence that ultimately comes out, may make clearer the key issues in the trial for both the prosecution and the defence, possibly leading to the earlier resolution of cases*. [32]

43. The Australian Institute of Judicial Administration's *Benchbook for Children Giving Evidence in Australian Courts* notes:

    > *It may be that, with increased use of pre-recording, support for child complainants, and greater sensitivity in the legal profession, the need for judicial officers to intervene in cross-examination will become more limited. In Western Australia, where reforms have been in place since 1992, there appears to be a legal culture that is more sensitive to child complainant's issues*.[33]

44. The Law Council considers that the pre-recording of all of a witness's evidence is a beneficial special measure, and provision for its use should be extended, particularly in relation to cases of child sexual abuse. As noted by the Royal Commission, the most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have disability.

45. However, any scheme for pre-recording must include safeguards in relation to the provision of a full brief of evidence to the defence so that any trial is conducted as much like a normal trial as possible. The accused should know the full case against him or her at the time of the pre-recording, just as would be the case if the child gave evidence at trial. It is not appropriate for the prosecution to be permitted, except in

[32] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 379.
[33] Australian Institute of Judicial Administration, *Benchbook for Children Giving Evidence in Australian Courts* (2012) 87.

exceptional circumstances, to obtain further or different evidence between the pre-recording and the time of the actual trial.

Chapter 10: Tendency and coincidence evidence and joint trials

46. The Royal Commission has indicated a preliminary view that 'the current law needs to change so that it facilitates more cross-admissibility of evidence and more joint trials in child sexual abuse matters'.[34] It has also stated that '[t]he Western Australian approach seems preferable, at least as it operates in Western Australia' to the approach taken under the Uniform Evidence Law[35] and '[t]here appears to be significant merit in the approach adopted in England and Wales'.[36]

47. The Law Council accepts that the approach of the common law as expressed in *Pfennig v The Queen* (1989) 167 CLR 590 and *Hoch v The Queen* (1988) 165 CLR 292 to what is now generally called 'tendency and coincidence evidence' is too restrictive. However, as the Royal Commission notes, the common law only applies in Queensland and, even there, it has been significantly modified.

48. In most Australian jurisdictions, the Uniform Evidence Law now applies. In the view of the Law Council, the critical issue is whether substantive weaknesses in that law have been demonstrated. If not, there would be good reasons to adopt that approach in the rest of Australia.

49. The Consultation Paper has indicated a preliminary preference for either 'the Western Australian approach' or the approach adopted in England and Wales. In coming to that preliminary view, it is apparent that the Royal Commission has regarded as very significant research done for the Royal Commission which 'found no evidence of unfair prejudice to the accused' from tendency and coincidence evidence in cases of child sexual abuse.[37]

50. However, a particularly important issue in this context is that, while the focus of the Royal Commission, and of the research, has been on cases of child sexual abuse, the 'approaches' taken under the Uniform Evidence Law, in Western Australia, and in England and Wales, apply to any tendency and coincidence evidence in any legal proceedings. The statutory provisions apply generally. None of these jurisdictions adopt specific provisions to deal with tendency and coincidence evidence in trials involving allegations of child sexual abuse.

51. Equally, the Royal Commission itself has acknowledged that it would not be appropriate to introduce statutory provisions which apply only to tendency and coincidence evidence in trials involving allegations of child sexual abuse.

52. Given this, the Royal Commission should not propose significant changes to the law that will apply generally to all tendency and coincidence evidence. First, what may be considered appropriate for one category may be inappropriate for another category. There are obvious differences between tendency and coincidence evidence in trials involving allegations of child sexual abuse and such evidence in cases of, for example,

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[34] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 389, 448.
[35] Ibid 449.
[36] Ibid.
[37] Ibid 419.

burglary, murder and even adult sexual assault. This was acknowledged to some extent in the Consultation Paper:

> *In trials for child sexual abuse offences, the main issue is usually whether or not the abuse occurred. Typically, the complainant can clearly identify the alleged perpetrator. This is often the case in institutional contexts, where there has often been a lengthy relationship between the complainant and the accused – for example, pupil and teacher or parishioner and priest. This can be contrasted with a typical burglary case, where there is no doubt that the offence has occurred and the question is whether the accused was the person who committed the offence. It may also be contrasted with adult sexual assault charges, where the issue of consent, and the accused's knowledge of lack of consent, are often in issue*.[38]

53. There will be significant differences in the probative value of such evidence, depending on the issue to which it is relevant, and there are likely to be differences in the ways that juries might approach such evidence (with consequent differences in dangers of unfair prejudice).

54. Second, the research that has been carried out for the Royal Commission has been too narrowly focussed to support such a general change. Equally, the Royal Commission is not in a position to advance comprehensive proposals for general reform given the focus of the Royal Commission's inquiry.

55. For these reasons, the primary submission made by the Law Council is that the Royal Commission should call on the Australian Government to refer to the ALRC a review of the law relating to tendency and coincidence evidence, where the ALRC would be assisted by the work already done by the Royal Commission. The review could look at the more general issues, carry out any necessary further research, invite the participation of law reform bodies in other Australian jurisdictions and develop a suitable general reform package.

56. The Law Council also makes a number of more specific submissions.

The Uniform Evidence Act approach

57. The Law Council has reservations with regard to the implicit criticism of the Uniform Evidence Act approach to tendency and coincidence evidence. The following points should be noted:

    (a) A number of Crown Prosecutors from NSW gave evidence before the Royal Commission and discussed cases they had been involved in where the view might be taken that an overly restrictive approach had been taken to the admissibility of tendency and coincidence evidence in trials dealing with allegations of child sexual abuse. However, all of these Crown Prosecutors expressed the view that the current approach in NSW to such evidence is satisfactory.[39] Counsel Assisting the Royal Commission have noted that the evidence of the NSW Crown Prosecutors 'was to the effect that the problems that previously beset the prosecution of offenders charged with multiple

[38] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 390.
[39] Transcript of Proceedings, Royal Commission into Institutional Responses to Child Sexual Abuse Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) T l7423, T l7460-4, T 17500.

offences against more than one complainant in NSW have largely been resolved'.[40]

(b) Counsel Assisting the Royal Commission also noted that 'the evidence received in the public hearings suggests that the provisions are working relatively well in NSW, and in a way which has significantly increased the ability to have cross-admissibility and joint trials with respect to allegations by multiple complainants'.[41]

(c) In the advice prepared for the Royal Commission by Tim Game SC, Julia Roy and Georgia Huxley, the opinion was expressed at [1.2] that the current rules in the Uniform Evidence Act jurisdictions 'are for the most part appropriate'.

(d) While there are differences between the approaches taken in Victoria and NSW to the same Uniform Evidence Law provisions (and some basis for criticism of the Victorian approach in respect of a number of issues), the Royal Commission notes that one of those issues has been already resolved by the High Court in favour of the NSW approach.[42] As Counsel Assisting the Royal Commission have noted, it is likely that the other issues will also be resolved by the High Court in due course.[43] In those circumstances, it is premature to propose changes to the Uniform Evidence Law because of concerns with the way that the Victorian courts have dealt with those issues.

(e) The Consultation Paper observes that 'it is not clear to us that the distinctions between tendency and coincidence evidence reflect how people – including jurors – reason. Rigid distinctions between tendency and coincidence evidence may be artificial'.[44] However, there is a clear distinction between the two kinds of reasoning, although the same item of evidence may on occasion permit both modes of reasoning. Further, any artificiality is of limited practical importance given that identical tests of admissibility apply to both categories of evidence.

58. As Counsel Assisting the Royal Commission have observed, any rational system of evidence law will require a court to engage in a balancing exercise of probative value and danger of unfair prejudice in relation to tendency and coincidence evidence.[45] Under the Uniform Evidence Law, if the prosecution is able to persuade the court that the evidence is capable of being regarded by a rational fact-finder as 'significant' and there is, in fact, little or no danger of unfair prejudice, then the evidence will be admitted. Such an approach maintains appropriate protection against a form of evidence which has long been regarded by the law as potentially carrying with it a real risk of unfair prejudice to the accused.

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[40] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [291].
[41] Ibid [172].
[42] *IMM v The Queen* [2016] HCA 14, 330 ALR 382.
[43] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [279]. Indeed, it should be noted that the High Court has granted special leave to appeal in respect of a case raising those issues: *Hughes v The Queen* [2016] HCATrans 201 (2 September 2016).
[44] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 449.
[45] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [284].

The approach taken in Western Australia

59. The Royal Commission has expressed a preliminary view that '[t]he Western Australian approach seems preferable, at least as it operates in Western Australia' to the approach taken under the Uniform Evidence Law.[46] However, the Law Council has a number of reservations about the Western Australian provisions:

    (a) The same test applies not just to tendency and coincidence evidence but other evidence such as 'relationship evidence' and any conduct of the accused from which some tendency or propensity to act in a particular way might be inferred. Counsel Assisting has agreed with the criticism of Game, Roy and Huxley that 'the definition of propensity evidence is manifestly too broad'.[47]

    (b) With regard to the proposition that the Western Australian approach is superior to the approach taken under the Uniform Evidence Law, it should be noted that one part of the Western Australian test ('significant probative value') is the same as under s 97 and s 98 of the Uniform Evidence Act.

    (c) The other part of the test ('the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial') is problematic. As Counsel Assisting has pointed out:

        > *This is not an area where some possible qualification on a fair trial is at issue. Rather, the dual interests of admitting tendency or coincidence evidence which is relevant, but without causing undue prejudice to the accused, are both elements of seeking a fair trial. That being so, the language of 'the degree of risk of an unfair trial' may both be something of a distraction, and fail to offer appropriate guidance to judges*.[48]

    (d) As regards the proposition that the Western Australian approach as it operates in practice is working well, it is significant that the only evidence on this issue received by the Commission has come from two prosecutors. As Counsel Assisting have pointed out, 'a feature of the public hearings was the absence of a contradictor. There is also an absence of academic scrutiny of the Western Australian system'.[49]

    (e) The Consultation Paper states that 'we have seen no evidence or heard any suggestion of injustices arising as a result of these changes'.[50] In the absence of a contradictor that may not be surprising but, more importantly, absence of evidence of injustice should not be conflated with evidence that there has not been injustice. It is difficult to imagine what evidence could ever be obtained to demonstrate that a conviction was unjustly obtained as a result of the admission of such evidence, absent the highly unlikely scenario of a complainant making an admission that the complaint was a fabrication.

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[46] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 449.
[47] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [236].
[48] Ibid [235].
[49] Ibid [281].
[50] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 447.

60. The Law Council does not support adoption of 'the Western Australian approach'.

The approach taken in England and Wales

61. The Royal Commission has expressed a preliminary view that '[t]here appears to be significant merit in the approach adopted in England and Wales'.[51] Indeed, a submission is sought as to 'whether there is any reason why we should not recommend adopting the approach in England and Wales'.[52] That approach may be summarised as adoption of a test for admissibility of mere relevance, with the possibility of discretionary exclusion by a trial judge. It appears that the Royal Commission has been influenced to take this preliminary view by the research done for the Royal Commission which 'found no evidence of unfair prejudice to the accused' from tendency and coincidence evidence in cases of child sexual abuse.[53] Criticism of that research is advanced below. However, there are additional reasons not to adopt the approach taken in England and Wales:

    (a) The English approach has not been followed in other comparable jurisdictions, such as Canada and New Zealand. These countries continue to insist that tendency and coincidence evidence should only be admitted where the prosecution satisfies the court that the evidence has sufficient probative value to justify admission.

    (b) As Justice McHugh J stated in *Pfennig v The Queen* (1995) 182 CLR 461 at 512-514, for more than a century, one of the fundamental theses of the common law has been that on a criminal charge guilt is not to be 'inferred from the character and tendencies of the accused'. The burden should rest on the prosecution to demonstrate that the particular circumstances of the case justify admission of such evidence. Counsel Assisting the Royal Commission noted that '[t]he common law has long expressed concern about such evidence, and the human experience and wisdom lying behind that manifest concern must be taken seriously'.[54]

    (c) The Victorian Director of Public Prosecutions, in his evidence before the Royal Commission, did not accept that a workable alternative system would be one where all relevant evidence was admissible, with the question of the probative value of the evidence being left for the jury. His view was that such an approach would potentially be unfair, because some evidence, whilst probative, would potentially be of a highly prejudicial nature.[55] He also observed that if an equivalent Code was implemented across Australia there would be the possibility of a plethora of interpretations of particular provisions across the different States and Territories.[56]

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[51] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 449.
[52] Ibid 451.
[53] Ibid 419.
[54] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [311].
[55] Transcript of Proceedings, Royal Commission into Institutional Responses to Child Sexual Abuse Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) I7573.
[56] Transcript of Proceedings, Royal Commission into Institutional Responses to Child Sexual Abuse Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) 17730.

(d) In the advice prepared for the Royal Commission by Tim Game SC, Julia Roy and Georgia Huxley, the opinion was expressed that any change in the current approach under the Uniform Evidence Act will lead to lengthier trials whereby collateral issues are explored and quite possibly a higher incidence of successful appeals.

(e) Retention of an exclusionary rule means more guidance from appellate courts as compared to appellate review of discretionary judgments at trial.

(f) While Professor Spencer, an English academic, indicated to the Royal Commission that he generally supported the approach taken under the Criminal Justice Act, his view is not widely supported among the academic community in England. However, even Professor Spencer observed that there would be a danger of injustice if such 'usually relatively weak circumstantial evidence' is admitted in a case where there is little or no other evidence linking the accused with the offence.

(g) The Consultation Paper states that 'we have seen no evidence or heard any suggestion of injustices arising as a result of these changes, which have now been in operation for more than 11 years'.[57] As observed in relation to a similar comment made in respect of the Western Australian approach, absence of evidence of injustice should not be conflated with evidence that there has not been injustice.

62. The Law Council does not support adoption of the approach taken to tendency and coincidence evidence in England and Wales.

The Jury Reasoning Research

63. The Consultation Paper discusses the research done for the Royal Commission in respect of tendency and coincidence evidence at 10.5.

64. No inference can be drawn that juries are giving fair consideration to each count merely because they convict on some counts and acquit on others. There may be other reasons than lack of unfair prejudice why a jury might give an accused the benefit of the doubt in relation to some charges.

65. The Law Council has significant reservations with respect to the conclusions drawn by the researchers. In that regard, the following comments with respect to that research should be noted.

66. One form of 'unfair prejudice' is what the researchers call 'character prejudice' – a juror considers the accused a person of bad character and for that reason applies a lesser standard of proof. Such bad character might be established by previous incidents that the accused has admitted, or does not dispute. The evidence used in the mock jury research was not of that kind. There were simply multiple complainants. The fact that the mock juries do not appear to have adopted a lower standard of proof in those cases does not disprove the unfair prejudice hypothesis. Equally, the prejudice that a jury will over-value tendency evidence could not realistically be measured for the same reason – it is unlikely the jury were satisfied of one allegation and then used it to infer guilt in respect of others. It is more likely they engaged in coincidence reasoning ('it is more likely one allegation is true because an independent

[57] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) 447.

person has made a very similar allegation'). As regards the danger of the jury over-valuing the evidence for coincidence reasoning, it is not apparent whether the research would be able to measure that. A juror saying, as some apparently did, that they needed more for proof beyond reasonable doubt in cases where tendency evidence was admitted may simply reflect the juror considering that there was in fact more evidence of guilt (because of the tendency evidence) and rationalising accordingly.

Responses to specific questions

67. With respect to some of the specific issues raised at 451 in the Consultation Paper, the following comments are made.

Should issues of concoction, contamination or collusion be left to the jury?

68. As noted by Counsel Assisting the Royal Commission, the High Court decision in *IMM v The Queen* [2016] HCA 14, 330 ALR 382, has resolved one of the main differences between Victoria and other jurisdictions that have adopted the Uniform Evidence Act. A majority of the High Court held that when a judge is considering the 'probative value' of evidence for the purposes of determining admissibility, including under section 97 and section 137 of the Act, he or she must proceed on the assumption that the evidence is both credible and reliable.[58] It would appear to follow that, for this reason, issues of possible collusion, concoction and contamination are considered to be almost always matters for the jury. While the position with regard to coincidence evidence is not clearly resolved, there is merit in the view that, where the prosecution relies on suggested improbability of coincidence to establish the probative value of the evidence, a trial judge should not be barred from considering alternative explanations.

69. The NSW Director of Public Prosecutions has indicated in evidence before the Royal Commission that the current position under the Uniform Evidence Act is satisfactory. He noted that decisions in NSW had resolved problems with the severance of joint indictments because of the possibility of concoction.[59] The law is that generally there will be no consideration of concoction or the possibility of it, because it was an issue that went to credibility and reliability. These were jury issues. The only exception would be if evidence of collusion or concoction was so clear that a clear miscarriage of justice would occur if the evidence was admitted.[60] It should be noted that Counsel Assisting the Royal Commission accepts that cases may arise where the evidence of concoction/contamination is 'so strong as clearly to deprive the evidence of significant probative value, such as to remove the basis for cross admissibility'.[61] The position under the English legislation is that a judge may either direct a jury to acquit or order the discharge of the jury if the judge is satisfied that the evidence is contaminated and the contamination would mean the conviction would be unsafe (although it has not been suggested that this approach should be adopted here). Provisions such as those in Western Australia which provide that 'it is not open to the court to have regard

[58] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [91]-[92].
[59] Transcript of Proceedings, Royal Commission into Institutional Responses to Child Sexual Abuse Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) l7694.
[60] Ibid 17694.
[61] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [330].

to the possibility that the evidence may be the result of collusion, concoction or suggestion' go too far.

Should the evidence need to be proved beyond reasonable doubt?

70. While most Australian jurisdictions currently require that a jury should be directed not to use tendency evidence against an accused unless satisfied that the tendency has been proved beyond reasonable doubt, the position in Victoria is that section 62 of the *Jury Directions Act 2015* has removed any such requirement. The preferable view may be an intermediate one - that if the existence of the tendency is indispensable to proof of guilt, it should be proved beyond reasonable doubt. It is arguable that juries should always be directed with respect to circumstantial evidence in general that, if they conclude that the existence of any particular circumstance is indispensable, or essential, before they could be satisfied beyond reasonable doubt of the guilt of the accused, they cannot find the accused guilty unless the existence of that circumstance is proved beyond reasonable doubt. However, this is an issue of general importance with implications far beyond the scope of the Royal Commission. It is another issue where a reference to the ALRC would be appropriate.

Should evidence of prior convictions be admissible?

71. The current position in most Australian jurisdictions is that, while any admission made by a person in one proceeding may well be admissible in a later proceeding, the opinion of a tribunal of fact in one proceeding is generally not admissible in another proceeding. The reasons for the general rule are based on policy and raise issues far beyond the scope of the Royal Commission. The Royal Commission has formed the view that the position in Western Australia is different, apparently relying on a single case (CDV) where there was a retrial and the convictions that had not been quashed on appeal were led unopposed as propensity evidence. It is not apparent that any court has ruled on the question. There are practical problems with any change. For example, a conviction in one trial may subsequently be held to have been a miscarriage of justice, with the consequence that evidence of the conviction in subsequent trials would most likely lead to convictions in those trials also being quashed on appeal. Counsel Assisting the Royal Commission have expressed the view that the arguments are 'finely balanced'.[62] In any event, the Law Council considers that the issue is of such general importance that the Royal Commission should call on the Australian Government to refer the issue to the Australian Law Reform Commission to review the issue more generally.

Should evidence of alleged conduct for which the accused has been acquitted be admissible?

72. The Law Council supports the current legal position.

In relation to joint trials: does any specific provision need to be made in favour of joint trials, in addition to any reform to the law in relation to admissibility of tendency and coincidence evidence?

73. The Law Council considers that the current position should be maintained – if the evidence is cross-admissible, a joint trial would be appropriate; if is not cross-admissible, the trials should be separated.

[62] Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Study 38: Opinion of Counsel Assisting the Commission regarding Week 1 of the Hearing, Admissibility of Tendency and Coincidence Evidence* (2016) [338].

Chapter 11 Judicial directions and informing juries

74. The Consultation Paper states:

> [I]*t seems that, through many legislative amendments responding to decisions of the appellate courts, both New South Wales and Victoria have arrived at a position in relation to corroboration, delay and reliability that is consistent with the social science research.*
>
> *It should also be noted that the New South Wales and Victorian provisions continue to ensure that the accused can receive a fair trial by allowing for relevant directions to be given where necessary to assist the jury in a particular case, without relying on broad and incorrect assumptions based on stereotypes and misconceptions about women and children and how 'real' victims of sexual offences, including child sexual abuse, will behave.*
>
> *If other states and territories have not yet arrived at similar positions in relation to these judicial directions, it may be appropriate for them to legislate in respect of these particular directions in advance of developing any broader codification. These directions are obviously of considerable significance in child sexual abuse trials and they may require fairly immediate attention.*[63]

75. The Law Council agrees with these observations. The law relating to the giving of judicial directions to juries in criminal trials is in need of review. Victoria has codified that law in the *Jury Directions Act 2015*. As a result, the uniformity in the Uniform Evidence Act jurisdictions has been significantly reduced. The issue should be referred to the ALRC to consider changes to Part 4.4 and Part 4.5 in the Uniform Evidence Act.

76. With respect to some of the specific issues raised at 485 of the Consultation Paper, the following comments are made.

Should judicial directions be codified?

77. As noted, Victoria has codified the law relating to the giving of judicial directions to juries in criminal trials in the *Jury Directions Act 2015*. To a great extent, the substance of the law in that Act is the same as applies in NSW. However, there are some differences. For example, a different approach is taken to the absence of a request for a direction by a party to the proceeding. In Victoria, there is no requirement to give a direction to the jury regarding circumstantial evidence relied on to prove an intermediate fact that is indispensable to proof of guilt. In Victoria, there is never a requirement to direct a jury to take into account a verdict of not guilty on one count when considering other counts.

78. Although it would be a matter for the ALRC to form a view on these issues in the event that it is given a reference, it is the view of the Law Council that the law in this area should not be codified. All topics requiring direction cannot be anticipated in advance. New topics emerge from time to time and the courts must be permitted to develop the law to deal with those emerging issues. To the extent that concerns arise with respect to directions given under the common law, on the basis that they are not consistent with the latest expert knowledge, legislation may be introduced to modify the law, as has taken place in NSW and some other jurisdictions.

[63] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice*, (5 September 2016) [475].

Should particular judicial directions, such as the Markuleski direction, be abolished or reformed?

79. It should be a matter for the ALRC to consider whether any particular judicial directions should be abolished or reformed. However, the Law Council would not support abolition of the 'Markuleski' direction. At its core, the purpose of such a direction is to ensure that a jury is not misled by a direction that they should consider each count separately and that different verdicts may be reached on different counts. A danger may exist that a juror, having doubts about a complainant's account in respect of one count, will believe that those doubts should be disregarded when considering the complainant's account in respect of another count. A judicial direction may be necessary to ensure that such an erroneous approach is not taken.

Chapter 12 Sentencing

80. With respect to the specific issues raised at 512 of the Consultation Paper, the following comments are made.

Should provision be made to exclude good character as a mitigating factor in sentencing for child sexual abuse offences, similar to the approach of the provisions in New South Wales[64] and South Australia – and should provision be made for good character to be an aggravating factor, as in England and Wales, where good character facilitated the offending?

81. As the Consultation Paper notes at 503, in those jurisdictions where there is no specific statutory provision excluding prior good character as a mitigating factor in sentencing for child abuse offences:

> *… where prior good character is raised in mitigation in types of matters where a breach of trust is apparent, it appears to be given very little weight. Indeed, the use of a person's good character and position of trust and authority to facilitate the offending can be raised as an aggravating factor in sentencing.*

82. For those reasons, there is no need to enact legislation which would prohibit the use of prior good character as a mitigating factor. While it might be said that such a provision would ensure that no weight at all would be given to prior good character, there is no need, or justification, for a legislative provision that places child sexual offences in a special category for which considerations of good character are completely ousted.[65] Evidence of prior good character may have some relevance to an assessment of the offender's prospects of rehabilitation. It may have some relevance to an assessment of the need for specific deterrence in the particular case. Given that there is no evidence to support a conclusion that prior good character is given inappropriate significance in those jurisdictions where there is no specific statutory provision excluding prior good character as a mitigating factor in sentencing for child abuse offences, then such legislation should not be enacted.

83. A number of arguments advanced in support of such legislation are based on misconceptions. For example, an offender's claim of good character may not be accepted. Acceptance that the offender demonstrated good character in certain aspects of the offender's life does not mean that it will be accepted that the offender

[64] The Law Council notes that the NSW legislation only prevents the Court from taking into account good character in mitigation where the good character assisted the offender to commit the offence. See s21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
[65] K Warner, "Sentencing Review 2008-2009" (2010) 34 Crim LJ 16 [23].

was generally of prior good character. Acceptance that the offender was of prior good character does not necessarily mean that the sentence will be reduced, because such an acceptance will not necessarily impact on the assessment of prospects of rehabilitation, likelihood of reoffending or the need for a deterrent sentence. Prior good character will have no bearing on the objective seriousness of the offending, nor on consideration of such sentencing goals as retribution and general deterrence.

Should there be a presumption in favour of cumulative sentencing for child sexual abuse offences, similar to the approach of the provisions in Victoria?

84. The Law Council opposes a statutory presumption in favour of cumulative sentencing for certain offences. Equally, it does not support a presumption in favour of concurrent sentencing. Rather, a sentencing court should simply apply the totality principle[66] when determining whether to accumulate sentences, and the extent of any accumulation. That principle requires the court to, first, assess the overall criminality of the offender inherent in the offences for which the offender is to be sentenced (in order to ensure that the overall sentence 'does not exceed the overall culpability of the offender'[67]), and second, consider whether the effect of any accumulation will result in 'a crushing sentence' that is 'not in keeping with [the offender's] record and prospects'.[68] Both limbs of the principle should be applied without any presumption in place regarding the outcome of that application. The principle should be applied whenever a court is sentencing an offender for more than one offence, regardless of the nature or seriousness of the offences in question.

Should child sexual abuse offences be sentenced in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, as now occurs in England and Wales?

85. The principle of non-retrospectivity holds that, where amending legislation increases the applicable maximum penalty for an offence, the increased penalty applies only to offences committed after the commencement of the amending legislation. The Law Council considers that the principle also has application in cases where sentencing standards have changed over time. Ultimately, sentencing standards turn on the applicable law of sentencing. If that law has changed so as to increase sentences for a particular offence, the offender should be sentenced in accordance with the standards at the time of the offending.

Chapter 13 Appeals

86. With respect to the specific issues raised at 529 of the Consultation Paper, the following comments are made.

Is reform needed in any state or territory to expand the prosecution's right to bring interlocutory appeals?

87. The Law Council supports the approach to interlocutory appeals taken in section 5F of the *Criminal Appeal Act 1912* (NSW).

[66] *Mill v R* [1988] HCA 70, 166 CLR 59 [62]-[63].
[67] *Postiglione v R* [1997] HCA 26, 189 CLR 295 [340] (Kirby J).
[68] Ibid [304] (Dawson and Gaudron JJ).

Are there any remaining difficulties in relation to 'inconsistent verdicts' which the Royal Commission should consider addressing?

88. The Law Council considers that the current law with respect to appeals based on 'inconsistent verdicts' is satisfactory.

Should the provisions for recording complainants' evidence at trial for use in any retrial be expanded or otherwise reformed?

89. The Law Council supports the video-recording of complainants' evidence at trial and the use of such evidence in any retrial, subject to a judicial discretion to modify this procedure if required in the interests of justice.

Chapter 14: Post-sentencing issues

Working with children checks

90. The Law Council previously provided a submission to the Royal Commission in response to *Issues Paper 1: Working With Children Checks*.[69] In brief, the Law Council supported the creation of a national working with children (WWCC) scheme that is evidence-based, appropriately targeted and adequately funded. However, the Law Council raised some concerns in relation to the scope of such a scheme and, in particular, whether having regard to pardoned, quashed or spent convictions should be permitted. The Law Council maintains its previous position.

91. In relation to the current Consultation Paper, it is noted that the Commission is interested in any gaps between WWCC schemes and the sex offender register schemes. The Law Council notes the Commission's recommendation that State and Territory governments should amend their WWCC laws to exempt children under 18 years of age, regardless of their employment status;[70] this is welcomed by the Law Council. However, this raises broader questions as to whether children should ever be entered on a sex offender register, and whether knowledge of the age of the victim should be a prerequisite to registration. The Law Council is concerned that sentencing courts have very limited, if any, discretion to exclude a person from registration.

92. State and Territory sex offender registration regimes (however described) have the potential to capture individuals under 18 years of age. In New South Wales if a child is convicted of two offences of 'act of indecency', for example, that child is a 'registrable person' for the purposes of the *Child Protection (Offenders Registration) Act 2000* (NSW).[71] If inclusion on the register is to give rise to disqualification from obtaining a working with children permit (whether by operation of law or practical effect) then a potential conflict arises vis-à-vis the age exemption: a person under the age of 18 would not be permitted to apply for a working with children permit simply by virtue of that person's inclusion on the register. It is suggested that, if being on the sex offender's register gives rise to disqualification from the WWCC regime, then an exception should be carved out for persons under the age of 18 to bring the interaction between the WWCC regime and the sex offender's regime in line with the Commission's recommended age exemption.

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[69] Law Council of Australia, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks: Issues Paper 1* (2013).
[70] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks Report* (2015) Rec 14(a)(i).
[71] *Child Protection (Offenders Registration) Act 2000* (NSW) sub-para 3A(2)(c)(i).

Post-sentence detention schemes

93. As the Commission has outlined in the Consultation Paper, a number of States and Territories make provision for the detention of high risk sex offenders after the expiration of the offender's sentence. Since the Commission is cognisant of the human rights concerns surrounding the schemes, these concerns will not be further addressed, though the Law Council does share them.

94. However, the Law Council holds concerns in relation to the accuracy of risk prediction. The assessment of risk is fundamental to the post-sentence detention regimes; the court is generally required to decide whether there is an 'unacceptable risk' of a person committing a relevant offence.[72] The difficulties associated with accurate risk prediction have been recognised by the courts. In *DPP (WA) v Comeagain*, McKechnie J stated that:

> *There remains an issue with all predictive tools in that they have not yet been validated. They were developed, in part, to overcome the perceived and actual weaknesses of an unguided clinical assessment and have been embraced by professionals, psychiatrists and psychologists, as an improvement on an unguided assessment. Nevertheless, it would be an error to attribute a degree of scientific certainty to the tools simply because they deliver an arithmetical outcome. They remain unvalidated. Years will have to pass before a retrospective survey can determine whether, and to what extent, the predictive tools are reliable*.[73]

95. In a similar vein, Callaway JA in *TSL v Secretary to the Department of Justice* cited an issues paper prepared by Professor Bernadette McSherry concerning the dangers of evidence provided by mental health professionals, especially in light of the '…potential for judges and juries to misunderstand and misuse risk assessments, assigning greater accuracy and inevitability to predicted behaviours than is warranted'.[74] Callaway JA also referred to Kirby J's judgment in *Fardon v Attorney-General (QLD)*, where his Honour held that

> *… [e]xperts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50% success rate*. [75] [citations omitted]

96. Given the consequences of a successful application for a continuing detention order and given that the assessment of risk plays a central role in determining such applications it is essential that the accuracy of risk predictions be sufficiently demonstrated. In this respect, apart from the decisions cited above, the Law Council also notes the conclusion of Ian R Coyle that '…the standard model for actuarial risk

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[72] *Crimes (High Risk Offenders) Act 2006* (NSW) sub-s 5B(2); *Dangerous Sexual Offenders Act 2006* (WA) sub-s 7(1); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) sub-s 9(1); *Dangerous Prisoners (Sexual Offenders) Act 2009* (Qld) sub-s 13(2); *Serious Sex Offenders Act 2013* (NT) sub-s 6(1).
[73] *DPP (WA) v Comeagain* [2008] WASC 235 [20].
[74] *TSL v Secretary to the Department of Justice* (2006) 14 VR 109 [122].
[75] *Fardon v Attorney-General (QLD)* (2004) 223 CLR 575 [623]. See further *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379 [165]-[166], *Attorney-General (NSW) v Tillman* [2007] NSWSC 605 [72]-[76] (Bell J). See further B McSherry and P Keyzer, *Sex Offenders and Preventative Detention: Politics, Policy and Practice* (2009) 19-49.

assessment of sexual offenders (Thornton, Hanson & Helmus, 2010) employed in Victoria and other jurisdictions is seriously, if not fatally, flawed'.[76]

97. The Law Council recommends that the Commission specifically consider the current risk assessment methodologies in relation to high-risk sex offenders with a view to assessing their validity, rigour and predictive power.

Chapter 15: Juvenile offenders

Age of Criminal Responsibility

98. Children are not held to be criminally responsible for their actions until they have reached a certain age. The age of criminal responsibility in Australia is 10 under federal law,[77] and in all states and territories,[78] despite the United Nations Committee on the Rights of the Child (**CRC**) having concluded that 12 is the lowest internationally acceptable minimum age of criminal responsibility.[79]

99. In its Concluding Observations in 2005 the CRC said that the age of criminal responsibility in Australia is 'too low',[80] and recommended raising it to 12.[81] This recommendation was reiterated in 2012.[82]

100. Under federal law, a child aged between 10 and 14 years can only be liable for an offence if the child knows that their conduct is wrong, and that question is one of fact for the prosecution to prove.[83]

101. This presumption is also enshrined in common law, operating in all Australian jurisdictions and known as the principle of *doli incapax*. This common law principle presumes that a child under 14 does not know that his or her conduct is wrong unless the contrary is proved.[84] In 1997 the Australian Law Reform Commission report, 'Seen and heard: priority for children in the legal process' recommended that the principle of *doli incapax* should be established by legislation in all jurisdictions to apply to children under 14.[85]

102. The CRC have acknowledged the common law doctrine of *doli incapax*,[86] noting that children between 10 and 14 in Australia are assumed to be criminally responsible only if they have the required maturity to realise the consequences of their actions. However, the Committee also noted:

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[76] Ian R. Coyle, 'The Cogency of Risk Assessments', *Psychiatry, Psychology and the Law* , Vol 18 No 2 270, 272.
[77] *Crimes Act 1914* (Cth) s 4M.
[78] Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106, ISSN 1445-7288 Canberra (2005).
[79] Committee on the Rights of the Child, General Comment No. 10: Children's rights in juvenile justice, (2007) [32].
[80] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention,* 40th sess, UN Doc CRC/C/15/Add.26820 (20 October 2005) [73].
[81] Ibid, [73-74].
[82] Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [84].
[83] *Crimes Act 1914* (Cth) s 4N.
[84] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [18.17].
[85] Ibid, Recommendation 195.
[86] *Doli incapax* 'means a presumption that a child is "incapable of crime" under legislation or common law: see Australian Institute of Criminology, 'The age of criminal responsibility', Crime facts info no. 106, ISSN 1445-7288, Canberra (2005).

The assessment of this maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.[87]

103. One of the Law Council's Constituent Bodies, the Victorian Bar, has previously submitted that the current system should be amended to reflect the advances in understanding of child cognitive and conative development.[88] Raising the age of criminal responsibility to 12 years of age would further Australia's commitments to fostering the best interests of the child as signatories of CROC. The LIV also supports this position.

104. The Victorian Bar has noted that at 10 years of age, most children are in grades 3-5 of primary school. They are still building the basic foundations for learning, and their capacity for higher order decision making is not developed even in optimal situations, let alone in situations of social and emotional distress or pressure.

105. Recent research by Jesuit Social Services, which looked at the rates and types of offending committed by 10-14 year olds, their circumstances, and incarceration rates, noted the disproportionate representation of children known to or involved with Child Protection who are charged with offending and/or remanded.[89] The report revealed that for children being held in remand in 2010-2011, aged 12 or under, *all* were known to or involved with Child Protection.[90]

106. The Victorian Bar considers that evidence suggests that children in the 10-14 age group who come to the attention of the criminal law are predominantly from the most vulnerable families in our community,[91] and that the earlier a child enters the formal criminal justice system, the worse the outcomes are for that child, and consequently, the community.

107. Further, Victorian Bar has identified that research has also shown that diverting young children away from the criminal law system has the most beneficial results in terms of reducing recidivism,[92] and it follows that society benefits more from keeping young children away from the criminal law system than putting them into it.

108. Raising the minimum age of criminal responsibility should not however be used to justify the removal of the doctrine of *doli incapax*. This doctrine's importance lies in ameliorating the full though blunt force of the law from having detrimental consequences for cognitively and emotionally immature children. It recognises that the path to adulthood is a transitional one. Raising the minimum age and retaining *doli incapax* would work in a complementary way to protect the most vulnerable children.

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[87] Committee on the Rights of the Child, General Comment No. 10 (2007) 'Children's rights in juvenile justice' 30.

[88] George Urbas has noted, in a paper title '*The Age of Criminal Responsibility*' for the Australian Institute of Criminology, that a substantial body of psychological research has assessed children's development in 'cognitive' (Piaget 1955), 'moral' (Kohlberg 1969) and 'conative' or impulsive/automative (Holland 1983) terms (see Morash 1981; Dalby 1985).

[89] Jesuit Social Services, *Thinking Outside: Alternatives to Remand for Children* (2013).

[90] Ibid, 61.

[91] For example, according to a Victorian study, as many as 78% of children who experienced remand at 10-12 years of age in 2012, had child protection involvement: Jesuit Social Services, *Thinking Outside – Alternatives to remand for children – Summary Report* (2013) 13.

[92] For example, the 2010 Australian Institute of Criminology paper on *Police diversion of young offenders and indigenous over-representation* notes that findings from several studies indicate that young people who are diverted through cautioning or conferencing are less likely to have re-contact with the criminal justice system than are young people who have a court appearance (Cunningham 2007; Dennison, Stewart & Hurren 2006; Hayes & Daly 2004; Stewart et al. 2007; Vignaendra & Fitzgerald 2006).

109. Raising the age of criminal responsibility should not impact the role of the child's voice in Child Protection proceedings. Whilst the two systems intertwine, there is a vast difference between a child's views being heard by the Court when making orders about their family and living situation, where the Court determines the weight to be given to those views; and imposing criminal responsibility on a child who is not cognitively or emotionally developed enough to bear the responsibility for his or her actions.

110. As outlined in a previous Law Council submission regarding the Optional Protocol to the Convention against Torture in the context of Youth Justice Detention Centres, the Law Council supports an increase in the age of criminal responsibility in Australia from 10 to 12 years of age, with the preservation of *doli incapax*.