Royal Commission into institutional responses to child sexual abuse
GPO Box 5283
Sydney NSW 2001

2 December 2016

**By email:** criminaljustice@childabuseroyalcommission.gov.au

Dear Commissioners,

**Model Provisions reforming use of tendency and coincidence evidence**

I am writing to you as President of the Australian Lawyers Alliance. The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

This letter responds to the proposed *Evidence (Tendency and Coincidence) Model Provisions* (the Model Provisions), circulated by the Royal Commission in November 2016.

The ALA recognises the challenges that are often faced by prosecutors in securing convictions for individuals accused of child sexual abuse. The frequent lack of independent evidence of the crime, particularly when it is reported well after any physical injuries have healed, can mean that fair trial protections that underpin the criminal trial process can pose an insurmountable hurdle in securing convictions in prosecutions of child sexual abuse. Balanced against these considerations must be the primary principle that defendants must receive a fair trial and that wrongful convictions are a stain on the criminal justice system.

With these observations in mind, we do not support the reforms proposed. They present a dangerous extension of already problematic use of tendency and coincidence evidence and would undermine fundamental fair trial protections, including the presumption of innocence. If implemented, these reforms could result in the conviction of innocent people.

These reforms present an even greater danger due to the absence of a criminal convictions review mechanism in all Australian jurisdictions and the absence of enforceable human rights legislation in most jurisdictions.

**Existing provisions**

The Royal Commission has proposed two alternative Model Provisions which would allow evidence of tendency, coincidence or propensity to be admitted as evidence.

Under the current Uniform Evidence Acts,[1] tendency and coincidence evidence can be admitted if it has significant probative value (ss97(1)(b) and 98(1)(b)). In criminal proceedings the probative value must substantially outweigh any prejudicial effect that it may have on the defendant (s101(2)) before the tendency or coincidence evidence can be admitted.

This legislation also grants the court a general discretion to exclude evidence if its probative value is substantially outweighed by a risk that the evidence might be unfairly prejudicial, misleading or confusing: s135. In criminal proceedings, evidence must be excluded "if its probative value is outweighed by the danger of unfair prejudice to the defendant": s137. Additional protections also

[1] In this letter we have relied on provisions in the *Evidence Act* 1995 (Cth). These provisions are replicated in the Uniform Evidence Act jurisdictions: ACT, NSW, NT, Tasmania, Victoria.

exist in Part 3.5, which excludes evidence of a decision or finding of fact from an Australian or foreign legal proceeding from being admissible to prove a fact in current proceedings: s91.

**Proposed changes**

The rules proposed in the Model Provisions would admit tendency, coincidence or propensity evidence that has a lower probative value than the existing rules, requiring the prosecution only show that the evidence is relevant, rather than having significant probative value. Protections for the defendant if the tendency, coincidence or propensity evidence would give rise to unfairness would also be reduced. There would be no requirement to balance the probative value of the evidence with the prejudicial effect it may have on the defendant. Further, evidence in relation to other trials in Australia or abroad would be admissible as tendency, coincidence or propensity evidence.

The changes proposed in the Model Provisions depart from the existing law both with regard to the threshold which must be reached before tendency, coincidence or propensity evidence may be admitted, and reduces the protections available to accused persons if that evidence might be unfairly prejudicial to them.

In Schedule 1, the proposed rules would admit tendency or coincidence evidence if it were considered to be "relevant to an important evidentiary issue": proposed s97(2)(b) and s98(2)(b) respectively. Schedule 2 includes the same formulation in relation to propensity evidence: proposed s98(2)(b). Thus the threshold is lower than the "significant probative value" threshold currently found in the Uniform Evidence Acts.

The general discretion in s135 and the requirement in s137 that the court exclude evidence considered unfairly prejudicial to the defendant would be removed in relation to tendency, coincidence or

propensity evidence by the Model Provisions: proposed s101 in Schedule 1 and s101A in Schedule 2. This evidence may be excluded by a court on the basis of unfairness only on the basis of an application by the defendant, and only if the giving of appropriate instructions to the jury (if there is a jury) would not remove the unfairness: proposed s98A of Schedule 1 and proposed s99 of Schedule 2. This represents a significant shift in the balance between the interests of the accused and the complainant in favour of the complainant.

**The need for reform**

The ALA notes that tendency and coincidence evidence is currently admissible in criminal proceedings for child sexual abuse, as outlined above. There has been a diversity of views as to whether reform of the Uniform Evidence Acts is required, with a general trend of prosecutors preferring reform of the laws[2] and law societies and legal aid commissions advocating for retention of the existing balance.[3]

As pointed out by the Victorian Legal Aid submission to the Royal Commission, "[t]he Commission's research shows that tendency and coincidence evidence is a powerful form of evidence which significantly increases conviction rates. Therefore, in most cases it will reach the threshold of significant probative value… Any further reduction of thresholds around the admission of such evidence risks imbalance that could lead to injustice and wrongful convictions."[4] The ALA supports this position.

[2] See, for example, submissions by the NSW OPP and the Victorian DPP to the Royal Commission in response to the Criminal Justice Consultation Paper. Note, however, that the ACT DPP, Jon White SC, in his submission to the Royal Commission in response to the Criminal Justice Consultation Paper was of the view that tendency provisions of the Uniform Evidence Acts were working well. He was, however, of the view that review to consider how changes to reflect the realities of child sexual abuse prosecutions could be better accommodated would be appropriate.
[3] See, for example, submissions by the Law Council of Australia, the NSW Law Society, Legal Aid NSW, Victoria Legal Aid to the Royal Commission in response to the Criminal Justice Consultation Paper. Most of these submissions recommended that any review of the rules of tendency and coincidence evidence would be more appropriately considered by the Australian Law Reform Commission.
[4] Victoria Legal Aid, *Child Sexual Abuse and Criminal Justice: Response to Royal Commission into Institutional Reponses to Child Sexual Abuse Consultation Paper on Criminal Justice*, (October 2016,

**Concerns**

We are particularly concerned about the ramifications that reforms of this nature would have on areas of law beyond child abuse. Reducing both the threshold for admission of tendency, coincidence or propensity evidence, combined with a reduction of protections for the accused and powers of the court to exclude prejudicial evidence, inevitably gives rise to increased risks of unfair convictions.

The rules of evidence in the proposed provisions have the potential to seriously undermine fair trials in unanticipated ways, when the challenges in securing convictions for child sexual abuse has been the primary concern. An investigation focusing on one area of criminal law, child sexual abuse, is not a suitable vehicle to conduct a comprehensive assessment of the general rules of evidence. To this end, we respectfully support the position of the Law Council of Australia that "the Royal Commission is not in a position to advance comprehensive proposals for general reform given the focus of the Royal Commission's inquiry".[5] We are troubled as to whether this proposal falls within the Royal Commission terms of reference. We note that a number of other legal associations agree that tendency and coincidence rules of evidence should not be reformed.[6] We submit that, if the rules in

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http://www.childabuseroyalcommission.gov.au/getattachment/96826777-0cdf-41bd-89ee-142346c21c0d/Victoria-Legal-Aid, 11, 12.

[5] Law Council of Australia, *Case Study 46, Criminal Justice* (October 2016), http://www.childabuseroyalcommission.gov.au/getattachment/a23750c1-6d01-431d-9069-9921e9a3fd9f/Law-Council-of-Australia, [54].

[6] See, for example, the submissions by the NSW Law Society, Legal Aid NSW, Victoria Legal Aid to the Royal Commission in response to the Consultation Paper on Criminal Justice. Most of these submissions recommended that any review of the rules of tendency and coincidence evidence would be more appropriately considered by the Australian Law Reform Commission.

relation to tendency and coincidence evidence are to be reviewed, the issue should be one for the Law Reform Commission. We are not convinced, however, that there is a need for reform in this area.

Without seeking to provide a comprehensive picture of the types of injustice that could arise if the rules of evidence were expanded as proposed in the Model Provisions, the ALA provides two examples such circumstances.

Firstly, allowing evidence that was used in a conviction by a foreign court to be admissible as tendency, coincidence or propensity evidence in the manner proposed in the Schedules could operate to validate flaws in trial processes abroad. People living in Australia have been convicted in unfair trials in courts around the world. Perhaps most famously in recent years, Peter Greste, Australian Al Jazeera journalist, was convicted in Egypt of “spreading false news” and supporting a banned organisation, the Muslim Brotherhood. Similarly, a number of refugees and asylum seekers have been convicted in the countries from which they seek refuge, which is often a component of the persecution they are fleeing from. Where reform of general tendency and coincidence evidence is concerned, admission of such convictions as tendency or coincidence evidence could give rise to unfair convictions of any number of crimes, including those relating to terrorism and national security.

This evidence could also be used against individuals who had a history of offending but were not involved in the offence in question. As well as the potential for unfair convictions, the use of such evidence could mean the actual perpetrator was not identified, charged or prosecuted, due to a misapprehension that the person unfairly convicted had committed the crime. It is precisely risks of this kind that the existing protections seek to guard against, and they continue to support restrictions on the use of tendency and coincidence evidence to circumstances in which prejudice to the accused is a primary consideration.

Thank you for the opportunity to comment on the Model Provisions.

Please do let me know if I can be of further assistance, in which case please direct correspondence to Anna Talbot, Legal and Policy Adviser, Australian Lawyers Alliance, on (02) 9258 7700 or at anna@lawyersalliance.com.au.

Yours sincerely,

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National President