



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: DHrgCrim:1463172

12 April 2018

Mr Andrew Cappie-Wood
Secretary
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: Stephanie.Button@justice.nsw.gov.au

Dear Mr Cappie-Wood,

Council of Attorneys-General Admissibility of Tendency and Coincidence Evidence Working Group – Scoping Paper

Thank you for the opportunity to comment on the potential reform directions contained in the Council of Attorneys-General, Admissibility of Tendency and Coincidence Evidence Scoping Paper ('the Scoping Paper').

The Law Society of New South Wales begins its observations noting that it is fundamental to a defendant's right to a fair trial and consistent with psychological research that an additional threshold should apply to the admissibility of prosecution tendency and coincidence evidence beyond the generic admissibility and exclusionary discretions and mandated discretion contained in the Uniform Evidence Law ('UEL'). The Law Society supports the creation of the Council of Attorneys-General Admissibility of Tendency and Coincidence Evidence Working Group ('Working Group') as described in the Scoping Paper. It also supports the fundamental importance of maintaining UEL uniformity with respect to tendency and coincidence evidence and it endorses the stance that no evidentiary law reform should apply only to child sexual abuse proceedings.

The Law Society applauds the Working Group's recognition of the need for caution to avoid the danger of unintended consequences in law reform. In this regard, the Law Society urges the Working Group to exercise caution in considering introducing untested conceptual language into admissibility provisions, as such an approach is likely to raise the danger of uncertainty, and generate a decade (or longer) of appellate testing of interpretative boundaries. This is a high price to pay for those involved in these trials and would only be justifiable on the strongest of foundations.

The Law Society also applauds the Working Group's recognition of the need for further research. We suggest that such research at least respond to concerns expressed below, and that in settling its research agenda it seek guidance from research psychologists, such as Professor Richard Kemp whose co-authored article (see below) has raised a number of issues. In addition, the Law Society supports the Working Group's acceptance to not investigate reforms directed to traversing a defendant's acquittal in subsequent proceedings ([114], p 14). As well as being out of scope, such reforms conflict with firm acceptance of

the principles underpinning the rule against double jeopardy and the presumption of innocence.

The Law Society's position is that there is no case for immediate legislated change. This is because the High Court majority decision in *Hughes v The Queen* [2017] HCA 20 has formulated an interpretation of key UEL elements consistent with the goals of protecting complainants articulated by the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'). In addition, the majority decision in *IMM v The Queen* [2016] HCA 14, as well as that in *Hughes v The Queen* [2017] HCA 20, have settled the contentious issues previously dividing state courts' interpretation of the UEL tendency and coincidence provisions. They are significant as they are at the permissive end of the spectrum. To disturb this newly-established consensus would neither achieve the goals articulated by the Royal Commission nor create certainty.

In light of *Hughes*, the Law Society disputes the assumption contained in the starting point expressed ([21], [24], p 5) namely, that there is a need to facilitate greater admissibility of tendency and coincidence evidence as part of the prosecution case in criminal proceedings.

The Law Society notes with approval the third starting point principle articulated in the Scoping Paper ([21] p5), namely, the importance of ensuring a fair trial for the defendant, and suggests the core assumption of any law reform steps must be the avoidance in the diminution of a defendant's procedural rights without clear basis of either need or justification.

The Scoping Paper suggests (at [56], p 8) that 'some level of similarity is required' despite *Hughes*, and that the New South Wales and Victorian courts' relevant UEL interpretation differences 'may be [merely] reduced' by the majority decision in *Hughes* ([10] p19). The Law Society suggests that it is clear from the *Hughes* judgment that the New South Wales courts' stance prevails. Hunter and Kemp, in the article below, suggest that the dangers and concerns of 'unfair risks' of 'wrongly undermining' complainants' credibility described by the Royal Commission are now addressed by the *Hughes* majority judgment.

In the absence of authority from the Victorian Court of Appeal since *Hughes*, it is difficult to say whether these problems identified in *Hughes* will persist at all. The Law Society urges the Working Group to note the concerns expressed by Professors Jill Hunter and Richard Kemp, in 'Proposed Changes to the Tendency Rule: A Note of Caution' (2017) 41 *Criminal Law Journal* 253, regarding the conclusions adopted by the mock jury study, J Goodman-Delahunty et al, '*Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*' ('the Jury Reasoning Study').

With respect to the suggestion in the Scoping Paper ([64] & [86], 9 &11) that judicial directions may be a cure for prejudicial risk, the Law Society suggests that the Working Group examine the research N Steblay et al, 'The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-analysis' (2006) *Law and Human Behavior* 30 469 (Hunter & Kemp, p 7, n 29). The Law Society would urge the Working Group to ensure its recommendations are consistent with international psychological research.

We are also concerned as to the particular potential injustice that lowering the threshold for the admission of tendency and coincidence evidence in criminal proceedings dealt with in lower courts (where defendants are more likely to be self-represented), and where the proposal of the Royal Commission to reverse the onus of making an application under section 101 would be particularly unfair.

The Law Society endorses the submission made by the NSW Bar Association. Finally, we encourage the Working Group to adopt a principled, evidence-based approach to law reform. As well as the intrinsic merit of such an approach, it is the one most likely to cultivate cross-jurisdictional support.

Thank you again for the opportunity to comment. We look forward to further engagement with the Working Group.

Yours sincerely,

A handwritten signature in black ink, reading "Doug Humphreys". The signature is written in a cursive, flowing style.

Doug Humphreys OAM
President