THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/PWrg:1401729

28 September 2017

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Attorney General,

Review of the Uniform Evidence Law

As you are aware, the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) has released its Final Report on Criminal Justice. A number of the recommendations of the Royal Commission propose amendment of the uniform evidence legislation, including the *Evidence Act 1995* (NSW).

On 16 August 2017 the Law Council of Australia wrote to the Commonwealth Attorney-General requesting him to refer to the Australian Law Reform Commission (ALRC) a comprehensive review of the *Evidence Act 1995* (Cth) (attached). That review would include consideration of the recommendations of the Royal Commission in relation to topics including tendency and coincidence evidence, evidence of convictions and acquittals, competence and compellability, jury warnings and directions.

The Law Society shares the Law Council's significant reservations about the approach taken to tendency and coincidence evidence by the Royal Commission, and remains unconvinced with the findings of the Jury Research Study report.

We caution against piecemeal change to the *Evidence Act 1995* (NSW). Creating separate evidentiary requirements for trials involving allegations of child sexual abuse *is* a piecemeal alteration and these very significant set of recommendations of the Royal Commission would benefit from broader consideration. We note that in New Zealand, section 202 of the *Evidence Act 2006* mandates periodic reviews of that legislation every five years in recognition that evidentiary and procedural innovations improve trial fairness and efficiency and that timely reviews ensure the legislation remains fit for purpose. We suggest that a broad review of the *Evidence Act 1995* (NSW) across current issues and needs, including the Royal Commission recommendations, is overdue. We, along with the Law Council of Australia, also consider that such a review would be assisted by the involvement of the NSW Law Reform Commission and our preference is for an ALRC/state law reform bodies' approach, as occurred in 2005. This would enable consideration of potential improvements, (such as reviewing privilege and religious confessions), potential simplification of processes (such as to judicial directions), and the improved integration of technological change, and finally enhanced uniformity. We would encourage the New South Wales Government to support this initiative, and also support it reaching out to Queensland, South Australia and Western Australia to enable revisiting expansion of the national footprint of the uniform evidence legislation.

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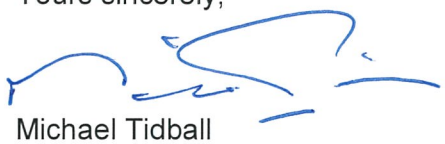
Any step forward should resist piecemeal change and embrace a holistic updating of this major piece of legislation. In any event, the Law Society and the Law Council of Australia requests that the NSW Government defer any decision to implement the recommendations of the Royal Commission relating to evidence law, and request the Australian Government refer a Review of the *Evidence Act 1995* (Cth) to the ALRC on the terms suggested above.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be contacted on 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer
Encl.

Law Council
OF AUSTRALIA

Office of the President

16 August 2017

The Hon George Brandis QC
Attorney-General
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Senate
Parliament House
CANBERRA ACT 2600

By email: **senator.brandis@aph.gov.au**

Dear Attorney

Review of the *Evidence Act 1995* (Cth)

The Law Council of Australia wrote to you on 18 November 2016 to request you to refer to the Australian Law Reform Commission (**ALRC**) a comprehensive review of the *Evidence Act 1995* (Cth) (**Evidence Act**). Given the recent release of the Final Report on Criminal Justice by the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**), the Law Council now repeats that request.

In your letter of 21 December 2016 you stated that, once the current inquiries by the ALRC had concluded, "consideration will be given to referring a further inquiry to the ALRC". The Law Council urges you now to consider a new reference on the law of evidence.

The Commonwealth Government will have to determine its response to the many recommendations advanced by the Royal Commission. A number of those recommendations propose amendment of the uniform evidence legislation (**UEL**), including the Commonwealth Evidence Act. Indeed, in respect of tendency and coincidence evidence, the Royal Commission has prepared draft amendments to that legislation.

In the Law Council's letter of 18 November 2016 the following was noted:

> *The Commonwealth Evidence Act 1995 was enacted after an extensive process of review of the law of evidence by the ALRC. Largely uniform legislation has been adopted in a number of other Australian jurisdictions: New South Wales, Victoria, Tasmania, the Australian Capital Territory and the Northern Territory. However, Queensland, South Australia and Western Australia continue to resist adoption of the uniform evidence law (**UEL**).*
>
> *While uniformity of evidence law across Australian jurisdictions remains a desirable goal in order to streamline trial processes, a more important goal is to ensure a rational and just system of trial procedure. Improvements can always be made to the rules of evidence, including the UEL. Reforms that have been adopted in Queensland,*

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South Australia and Western Australia may be worthy of adoption more generally.

A major review of the Commonwealth Evidence Act 1995 was initiated in 2005, when the ALRC was given a reference for that purpose. The resulting reforms encouraged Victoria and the Northern Territory to adopt the legislation. Further reform of the UEL may encourage Queensland, South Australia and Western Australia to adopt the uniform legislation.

The Law Council is of the view that it is time for another reference to the ALRC.

The Law Council has significant reservations about the approach taken to tendency and coincidence evidence by the Royal Commission. A number of the views advanced by the Royal Commissioners regarding the current state of the law are debatable. For example, the Law Council does not accept the proposition at page 70 in Volume 1 of the Final Report:

> *We are satisfied that concerns that tendency or coincidence evidence carries a high risk of unfair prejudice to the accused are misplaced.*

It is that view which has led the Royal Commission to propose (at 70) that "the first limb of the test for admissibility should reflect a test of relevance but with some enhancement". The Law Council has substantial concerns with adoption of a test of mere relevance as the basis for admissibility of such evidence. Further, contrary to the views of the Royal Commission, the Law Council considers 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. The ALRC is the appropriate body to review the law relating to tendency and coincidence evidence, assisted by the work already done by the Royal Commission. Such a review could consider the issues more generally, carry out any further research, invite the participation of law reform bodies in other Australian jurisdictions and develop a suitable general reform package.

In that regard, it should be noted that the Royal Commission acknowledged the desirability of the ALRC considering some issues raised in this area. For example, it is stated at page 74:

> *We consider that there may be circumstances in which evidence of acts for which the defendant has been acquitted should be admissible. However, this was not the subject of detailed evidence before us, and we are content to leave this issue for more detailed consideration by law reform commissions in the future.*

As regards directions to juries in child sexual assault trials, the Royal Commission has proposed (Recommendation 64):

> *State and territory governments should consider or reconsider the desirability of partial codification of judicial directions now that Victoria has established a precedent from which other jurisdictions could develop their own reforms.*

The Royal Commission has also recommended (Recommendation 65) a number of specific legislative amendments in respect of judicial directions and warnings, in relation to delay, uncorroborated evidence and the evidence of children.

In 2015, Victoria codified the law relating to the giving of judicial directions to juries in criminal trials in the *Jury Directions Act 2015*. The provisions in Part 4.5 of the Victorian *Evidence Act 2008* dealing with jury warnings have been amended so that they apply only to juries in civil proceedings. As a result, the uniformity in the UEL jurisdictions has been significantly reduced but, more importantly, there are significant substantive differences between the two largest UEL jurisdictions, NSW and Victoria, which raise real questions regarding the whole approach to jury directions about evidence in criminal trials. These are important issues which have application far beyond the scope of the Royal Commission. All the law relating to the giving of judicial directions to juries in criminal trials is in need of review.

Another recommendation of the Royal Commission touching on the UEL is Recommendation 35, which proposes that, where a criminal offence is introduced for a failure to report, the legislation should "should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective". Section 127 in the UEL currently creates a privilege in respect of religious confessions. Whether or not such a privilege should be retained raises broad questions of public policy and is a matter that should be referred to the ALRC.

In our letter of 18 November 2016, the Law Council also advanced other reasons as to why a reference to the ALRC would be appropriate. One was the uncertainty created by the then recent decision of the High Court in *IMM v The Queen* [2016] HCA 14, 330 ALR 382. Since then there has been another High Court judgment in the area, *Hughes v The Queen* [2017] HCA 20. It is briefly referred to by the Royal Commission. It also raises important issues about the proper scope of the tendency rule and the admissibility of such evidence in criminal trials. It provides another reason for a reference to the ALRC.

Our November letter also noted that there are a number of other issues that have emerged in relation to the UEL where a policy review is desirable, including by reference to experience in the non-UEL jurisdictions of Queensland, South Australia and Western Australia. That remains the case today.

In conclusion, the Law Council considers that it is now time for a new, comprehensive, review of the UEL by the ALRC, building on the substantial reforms to the law of evidence introduced by the UEL.

The Law Council would be pleased to meet with you to discuss these issues.

Please contact Dr Natasha Molt, Senior Legal Advisor, on 02 6246 3754 or natasha.molt@lawcouncil.asn.au, in the first instance, should any further information be required.

I look forward to your response.

Yours sincerely

Fiona McLeod SC
President