

Submission to the Department of Justice in response to its Discussion Paper on Strengthening Child Sexual Abuse Laws

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Justice Strategy and Policy

Department of Justice

GPO Box 31

Sydney NSW 2001

By email: policy@justice.nsw.gov.au

Contact: Emily Ryan

President, NSW Young Lawyers

Liam Cavell

Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Sharyn Jenkins and Kartini Saddington (Submissions Coordinator)

The NSW Young Lawyers Criminal Law Committee makes the following submission in response to the Department of Justice’s Discussion Paper on Strengthening Child Sexual Abuse Laws in NSW.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Criminal Law Committee (**Committee**) is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

The Committee welcomes the opportunity to address some of the issues raised by the Department of Justice in its Discussion Paper on Strengthening Child Sexual Abuse Laws in NSW (**Discussion Paper**).

The Committee also welcomes the opportunity to address the proposed amendments by the Department of Justice in response to the Royal Commission into Institutional Responses to Child Sexual Abuse’s (**Royal Commission**) recommendations. The Committee is of the view that a review of the criminal justice system is necessary and appropriate to ensure that victims, and the community, are properly represented, to punish offenders and deter others from committing further offences.

In this submission, the Committee restricts itself to five topics of particular significance. These are:

- 1) clarifying the offences of indecent assault and act of indecency;
- 2) addressing difficulties arising from historic child sexual offending;
- 3) improving the offence of persistent child sexual abuse;
- 4) introducing specific offences of failing to protect and failure to report; and
- 5) tendency and coincidence evidence.

Chapter 4: Clarifying offences of indecent assault and act of indecency

Q7. Should the description of the offences of indecent assault and act of indecency committed against children under 16 years be improved? If yes, what option(s) is preferable?

The Committee submits that the description of the offence of indecent assault against a child under the age of 16 years could be improved and supports reform similar to section 49D of the *Crimes Act 1958* (Vic).

The Committee submits that the reformed legislation should include subsections which make it an offence for an adult to:

- (a) Indecently touch another person under the age of 16;
- (b) Cause or allow that other person to indecently touch them; or
- (c) Cause that other person to:
 - a. Indecently touch themselves;
 - b. Indecently touch a third person; or
 - c. Allow themselves to be touched or continue to be touched by a third person in an indecent manner.

It is the Committee's view that the above subsections could remedy a difficulty in prosecuting cases where a child is encouraged to touch an adult in an indecent manner and complies with said request. This difficulty arises in situations where a complainant is unable to give evidence that the touching was performed as a result of their fear of the offender. Even when there is evidence of fear, the prosecution may face the difficulty of proving that the child was in fear at the time of the offence and has not recently developed said fear due to a greater understanding of the offending conduct.

Although, as the Discussion Paper recognises, examples such as the above could be charged under s 61N (Act of Indecency), the difference in the maximum penalty for each offence¹ produces an inadequate result that fails to recognise the seriousness of the offending.

¹ Section 61M(2), Aggravated Indecent Assault has a maximum penalty of 10 years; whereas s 61N(1) has a maximum penalty of two years, *Crimes Act 1900* (NSW).

Q8 Should the term 'indecent' and the common law definition remain?

The Committee submits that the common law definition of indecent should remain. The concept of indecency is one of a community evaluation of appropriate conduct; because community standards as to the appropriateness of conduct changes, the Committee is of the view that it is important that the law maintain its reliance on the community to arbitrate what it says is indecent.

Chapter 6: Addressing difficulties arising from historic child sexual offending

Q10. Should a provision be introduced to permit the prosecution to rely on the offence with the lesser maximum penalty where the alleged date range includes more than one offence?

The Committee submits that a provision should be introduced to permit the prosecution to lay a single charge where there is uncertainty about the age of the victim at the time of the offence and/or the range of dates averred would cover more than one offence. The legislation should require that the prosecution elect the offence with the lesser maximum penalty and that the elected offence must have been in force during those dates. Where definitions may have changed, the definition applied at trial should be that applicable to the offence elected.

Such a change would help to avoid the difficulties of particularising an indictment where the period of offending covered various iterations of the offence provisions (as demonstrated in *NW v R* [2014] NSWCCA 217), whilst ensuring fairness by preventing an offender being charged with an offence that was materially different at the time of offending. Further, the change would simplify directions at trial and prevent the need for defence counsel to negate a number of alternative elements which cover the same conduct but are relevant to different offences because of the overlapping age and date range.

The suggested provision would also uphold the legislative principle that offenders must receive a benefit if the maximum penalty for an offence is reduced, but do not suffer if the maximum penalty is increased, as per the decision in *Gilson v The Queen* (1991) 172 CLR 353.

Q11. Should NSW adopt the Royal Commission’s recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty?

The Committee submits that NSW should adopt the Royal Commission’s recommendation that in historic child sexual abuse matters an offender is sentenced by applying current sentencing principles but in accordance with the historic maximum penalty.

Whilst courts have generally applied historical standards and processes of sentencing on the basis of the principle of presumption against retrospective application of law,² such practice warrants amendment for these kinds of crimes. The Committee submits that in the context of these types of offences, the concerns about fairness to an accused person are outweighed by two other concerns: the manifest inadequacy of historical standards, and the difficulty in ascertaining such standards.

The application of current sentencing principles acknowledges modern understanding of the harm caused by child sexual abuse, and recognises the ongoing nature of the damage to victims.

As well as more adequately recognising the harm caused to victims, the application of modern sentencing principles addresses the concern expressed in *Gaven*³ and *Pemble*⁴ that perpetrators of historical offences continue to benefit from erroneous assumptions made as to the harm resulting from their offending.

It is often difficult to accurately ascertain historical sentencing approaches. Material from which these standards are to be ascertained is often hard to obtain, and does not always allow the Court, or a practitioner, to make an objective assessment of the practices and patterns of sentencing at the relevant time. That the vast majority of District Court decisions remain unpublished further aggravates the situation, leaving practitioners to rely upon only those decisions that have been the subject of an appeal. In this regard, the Committee reflects the concerns of his Honour Justice Basten in *R v MPB* that reliance on judicial memory can be inconsistent and untestable.⁵

² See for example, *R v Major* (1998) 70 SASR 488; *R v MJR* (2002) 54 NSWLR 368 (Spigelman CJ, Grove J, Sully J and Newman AJ; Mason P strongly dissenting); *R v Wruck* [2014] QCA 39; (2014) 239 A Crim R 111; *Green v The Queen* (2006) 19 NTLR 1 at [46]–[47].

³ *R v Gaven* [2014] NSWDC 189.

⁴ *R v Pemble* [2015] NSWDC 168.

⁵ *R v MPB* [2013] NSWCCA 213.

The Committee notes that the continued application of s 19 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) mitigates the risk of unfairness to the accused by preserving the historic maximum penalty applicable to the offence.

Q12. Should the repeal of the limitation period for certain child sexual assault offences committed against females aged 14 and 15 years be made retrospective as recommended by the Royal Commission?

The Committee recognises that a retrospective repeal of the limitation period may create uncertainty in the mind of perpetrators who have not yet faced prosecution. However, the Committee is of the view that the repeal should be made retrospective for a number of reasons.

The retrospective repeal of limitation periods will not only bring New South Wales' criminal law into line with the law in other States, such as South Australia, Victoria and the ACT, but also with the repeal of limitations in civil law. This retrospective application of such a repeal would also place female victims of historical child sexual abuse on an equal footing with male survivors,⁶ and thus promotes parity among offenders.

Perhaps most importantly, the retrospective repeal of limitation periods would address the now well-recognised difficulties that adult survivors of child sexual abuse face in coming forward with allegations.

Q13. Should the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse be made retrospective?

The Committee is of the view that the repeal of the common law presumption that a male under 14 years is incapable of having sexual intercourse should be made retrospective.

The common law presumption is based on assumptions, which have since been disproven. Researchers in a 2005 Griffith University study found that '23% of young people who are in treatment for their sexually abusive behaviours are aged 10-12 years and 70% are 15 years or younger'.⁷ An Australian Institute of Family Studies report from 2005 opined that there were two 'peak' ages for male sexual offenders, one being

⁶ Historical offences against male children are not statute barred from prosecution.

⁷ Chamarette, Grant, and Thornton 'Residential placement of intra-familial adolescent sex offenders' (Trends & Issues in Crime and Criminal Justice No 315, Australian Institute of Criminology, May 2006)

around 14 years and the second being in the mid-to-late 30s.⁸ This research contradicts the presumption that males under the age of 14 years are physically incapable of having sexual intercourse.

The repeal of the common law presumption of incapacity would not supplant the *doli incapax* presumption which applies to children up to the age of 14 years.

The Committee submits that the retrospective application of this repeal is necessary to negate immunity arising from an erroneous historical factual assumption.

Chapter 7: Improving the offence of persistent child sexual abuse

Q14. Should the NSW offence of *persistent child sexual abuse* be replaced by the model provision recommended by the Royal Commission?

The Committee does not support the enactment of the Royal Commission model provision. In particular, the Committee holds concerns about recommendation (iii) that ‘jurors need not be satisfied of the same unlawful sexual acts’.

The Committee opposes such a provision as it offends the principle of procedural fairness towards an accused person. In coming to such a conclusion, the Committee reflects the concerns of his Honour Justice Kirby in *KBT v R* in which he stated that the requirement of proof of three particular acts was a ‘parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence’.⁹ By removing the requirement of extended unanimity¹⁰ an accused person is open to the possibility of an internally inconsistent verdict whereby jurors disagree as to which offences have been proven. This risk would be further aggravated in matters in which the prosecution alleges a large number of offences out of which, as the model provision suggests, a juror is only required to be satisfied of two.

Further, such a change could create great difficulties in sentencing an offender for an offence against s 66EA. As the plurality in *Chiro* recently stated ‘it is for the jury, and the jury alone, to determine which of the alleged acts of sexual exploitation they find to be proved’.¹¹ An amendment, such as that proposed by the Royal Commission, would necessitate a sentencing judge to go behind the jury’s verdict in order to

⁸ Boyd and Bromfield ‘Young People Who Sexually Abuse: Key Issues’ (NCPC Practice Brief No. 1, Australian Institute of Family Studies, December 2006).

⁹ *KBT v R* (1997) 191 CLR 417, 432

¹⁰ As outlined by the High Court in *KBT v The Queen* (1997) 191 CLR 417.

¹¹ *Chiro v The Queen* [2017] HCA 37 at [39] and [42].

determine the facts upon which the offender should be sentenced. This could lead to the risk of an offender being sentenced for an offence, which the jury did not find the accused committed, in breach of the principle in *De Simoni*.¹²

The plurality in *Chiro* also stated that where a judge does not or cannot ascertain which of the alleged acts of sexual abuse the jury has found to be proved, 'the offender will have to be sentenced on the basis most favourable to the offender'.¹³ By legislating against extended unanimity, a sentencing judge will be forced to find facts in line with the least serious offences alleged, potentially leading to manifestly inadequate sentences for this type of offending.

Q15. Should the offence of *persistent child sexual abuse* be retrospective as recommended by the Royal Commission?

The Committee does not support this recommendation. Although the Committee recognises the benefits that such retrospective application may grant to the prosecution, it is the Committee's view that these benefits do not outweigh the unfairness to an accused person.

Although a historical offence of persistent child sexual abuse could only be founded on incidents that were offences at the time of commission, its retrospective application opens an offender up to a much higher maximum penalty than would have been imposed at the time. Such a possibility would be in contravention of international human rights frameworks, in particular Article 15.1 of the *International Covenant on Civil and Political Rights* which prohibits States from imposing heavier penalties on an offender than those that were applicable at the time of offending.

Q16. Should an offender being sentenced for an offence of *persistent child sexual abuse* receive a higher penalty than isolated offences to reflect the ongoing nature of the abuse?

The Committee supports this proposition, in so far as it does not involve an alteration to the existing maximum penalty.

As stated by the NSW Court of Criminal Appeal in *ARS* and the High Court of Australia in *Chiro*, the sentence for an offence against s 66EA is to be determined by reference to each sexual offence for which

¹² *R v De Simoni* (1981) 147 CLR 383 at 389.

¹³ *Chiro v The Queen* [2017] HCA 37 at [52].

the offender would have been sentenced if charged separately.¹⁴ However, this principle does not require a sentencing judge to consider the ongoing nature of the abuse, and the particular harm that such persistent abuse can cause. The Committee supports the use of Victim Impact Statements in sentencing for such offences to highlight this ongoing harm.

However, the Committee considers that the need for the imposition of a higher penalty is adequately reflected in the maximum penalty of 25 years imprisonment for an offence against s 66EA. This maximum is greater than those able to be imposed for most individual sexual offences that fall under this section, thereby permitting a sentencing judge to exercise their discretion to impose a higher penalty.

Should the Department of Justice recommend a legislative change to ensure that a sentencing judge considers the ongoing nature of the abuse, the Committee supports the insertion of a provision similar to subsection 5(2F) of the *Sentencing Act 1991* (Vic) which states that a court must 'impose a sentence that reflects the totality of the offending'. Although this section specifically applies to the Victorian 'course of conduct' offence, discussed below, the application of this principle in sentencing for s 66EA offences is apposite.

Q17. Should a course of conduct charge, as introduced in Victoria, be enacted?

The Committee supports the introduction of a 'course of conduct' charge, as has been done in Victoria. Such an offence would permit complainants to give evidence of the conduct that would generally occur, as opposed to evidence of a small number of particular offences. The introduction of this offence would permit the victims of ongoing abuse to give evidence of the abuse perpetrated against them, without the need to distinguish between the occasions of abuse.

The introduction of such a charge is supported by the recent report on memory, commissioned by the Royal Commission. This report found that the memories of victims of abuse were detailed and accurate at a macro- or core level, rather than at a micro-level, meaning that participants were more accurate in their recall of incidents occurring generally, rather than the minor details of those incidents.¹⁵ Equally, the memory study found that the common features of repeated events were resistant to error and misinformation, whereas errors were common in relation to differentiating features of offences.¹⁶

¹⁴ *ARS v R* [2011] NSWCCA 266 at [231]-[233]; *Chiro v The Queen* [2017] HCA 37 at [44].

¹⁵ Goodman-Delahunty, Nolan and van Gijn-Grosvenor, (2017) *The Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney) 143.

¹⁶ *Ibid*, 97-98; The British Psychological Society Research Board, 'Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory' (The British Psychological Society, 2010) 2, 15.

This research shows that the introduction of such an offence would not result in an increase in unsound convictions, but would rather permit complainants to provide the most accurate evidence possible.

Q18. Should a course of conduct charge be available for historic offences?

The Committee supports the retrospective application of ‘course of conduct’ offences, but only where such application would be subject to the protections provided in subs 5(2F)(b) of the *Sentencing Act 1991* (Vic). This subsection provides that a court ‘must not impose a sentence that exceeds the maximum penalty prescribed for the offence if charged as a single offence’. Coupled with a requirement that the course of conduct only be comprised of charges in force at the time of the assault, this subsection would prevent a court from applying the contemporary penalty for a course of conduct where the historical maximum penalty is lower.

The Committee is of the view that the creation of such a protection would ameliorate much of the concerns regarding potential unfairness to the accused person and allow the victims of historic child sexual offences to achieve justice.

Chapter 10: Introducing specific offences of failing to protect and failing to report

Q23. Should the Royal Commission’s model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

The Committee submits that the nature of child sexual abuse is such that it warrants a specific offence for failing to report child sexual abuse. This is because s 316 of the *Crimes Act 1900* (NSW) does not adequately balance the policy objective of encouraging the reporting of child sexual abuse offences with the need to respect the wishes of victims who, particularly in the context of child sexual abuse, may not want the person they have confided in reporting the offending to the authorities. Consequently, the Committee supports recommendations to introduce offences similar to s 327 of the *Crimes Act 1958* (Vic), and adopting a “reasonable belief” standard. However, the Committee submits that “police” in s 327(2) should be replaced with “appropriate authority” to enable NSW to make its own jurisdictional arrangements. Such an offence could have exclusions similar to those in the Victorian legislation to ensure that the interests of the victim are fully safeguarded.

The Committee also endorses the Royal Commission’s recommendation for a failure to report offence specifically directed at institutional settings, with a lower standard of “reasonable suspicion”. Such an offence should apply to professionals who work with children in institutional settings. Accordingly, the reporting authority should be external to the institution in which the reporter of the offence is employed. The Committee is also of the view that there must be an aggravated articulation of the offence in occasions where there are repeated failures to report relevant information.

A specific legal duty to report abuse would help provide greater guidance to people who work within organisations where abuse may be disclosed, and would also reinforce community expectations regarding the conduct of responsible adults in their interactions with children.

Q26. Should the Royal Commission’s model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

The Committee endorses legal mechanisms that censure failures on the part of institutions to protect against child sexual abuse. Institutional structures and culture can create or facilitate impunity. Furthermore, as the Royal Commission’s work has made clear, the decisions of senior management within organisations can have dramatic impacts on the commission, detection, and prevention of abuse.

The Committee considers the adoption of a provision similar to s 49C of the *Crimes Act 1958* would ensure appropriate sanction. A “failure to protect” offence should apply a criminal negligence standard to failures to take appropriate steps where there is knowledge of a substantial risk. Such an offence usefully directs attention to measures, beyond reporting, that go to institutional arrangements and managerial decisions. Adopting a provision along the lines of s 49C places an onus on senior personnel in an organisation to take active steps to protect the children in their care.

Further, the Committee submits that if this approach were adopted, a proposed ‘failure to report’ offence would still have work to do. This is because a ‘failure to report’ offence would apply to those who are not necessarily in a position to take action within an organisation (beyond reporting). The Committee notes that the failure to protect offence could potentially encompass a wide range of behaviour, and so it may be appropriate to draft graduated offences reflecting increasingly serious criminality or, alternatively, leave a wide sentencing discretion to the Court. The Committee also submits that there should be an aggravated version of the offence where there are consistent failures to take action by institutions to protect children that has caused significant harm to a number of children.

Furthermore, it would be particularly important in drafting offences applicable to institutions that consideration be given to formulating a definition that prevents entities from hiding behind an ephemeral legal existence to avoid liability.

Chapter 14: Tendency and Co-incidence Evidence

Q31. Should the approach to tendency and coincidence evidence proposed in the draft legislation at Appendix E be adopted? If not, should aspects of that approach or any other option for reform be pursued in NSW?

The Committee generally endorses the proposed model provisions, although holds some concerns regarding Schedule 1. In a submission to the Royal Commission on 27 February 2017, in response to its proposed Model Bill, the Committee expressed in-principle support for reforming how tendency and coincidence rules apply to child sexual assault matters:

“The Royal Commission has identified issues regarding the cross admissibility of evidence and joint trials in child sexual assault matters. These problems remain particularly salient in the prosecution of offences of this nature – as the circumstances in *R v Hughes* demonstrate. Accordingly, as a matter of fairness to victims, the Committee submits that there is certainly a need to broaden the circumstance where evidence of this nature may be admitted.”¹⁷

However, the Committee also expressed a number of concerns regarding the changes proposed by the Royal Commission, including that:

1. the Model Bill would have implications across the criminal justice system – not simply in child abuse prosecutions;
2. the important evidentiary issue (IEI) test would not effectively exclude inappropriate evidence;
3. the IEI test would also apply to the evidence of complainants and witnesses;
4. the Model Bill would effectively nullify the operation of Part 3.7 of the Uniform Evidence Law (UEL) as it currently applies to exclude evidence relating to a witness’ credibility; and
5. evidence of acts in relation to which a person has been acquitted are prima facie admissible under the Model Bill.

The first concern has been addressed in Appendix E by specifying that the proposed ss 97(1A) and 98(1A) only apply in a ‘child sexual offence’ proceeding.

¹⁷ NSW Young Lawyers Criminal Law Committee Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice System Model Amendments to the Uniform Evidence Act*, 27 February 2017.

The Committee remains concerned about the capacity of the IEI test in Appendix E to exclude inappropriate evidence. The proposed ss 97(1A) and 98(1A) both distinguish between matters that are relevant to an IEI for defendants and matters of substantive probative value for any other party. The Committee previously submitted to the Royal Commission:

“The current ‘significant probative value’ test directs attention to the extent to which the relevant evidence can ‘rationally affect the assessment of the probability of the existence of a fact in issue’.¹⁸ The court has to assess the probative value of the evidence proposed to be admitted. Such an assessment must be contextual and fact-specific.¹⁹ The proposed rules remove this requirement. Evidence is admissible if the evidence is relevant to one of the enumerated IEI, and that the notice requirements have been met. The proposed amendments specify that evidence falling within those categories is relevant, and therefore admissible.

Importantly, the interaction here with ss 55 and 56 of the UEL [Uniform Evidence Law] is unclear. It may be that there is evidence that falls within the IEI categories that, because of its nature, could not rationally affect the assessment of the probability of the existence of a fact in issue. In such circumstances, it would not be an unfair reading of the proposed provisions that ss 55 and 56(2) are modified by the new concept of relevance to an IEI. Therefore, even if s 55 remains the appropriate test for relevance under the proposed amendments, it is apparent that the new evidentiary threshold will be lower than the current interpretations of ‘significant probative value.’”

Those concerns are magnified by s 100A(4) of Appendix E, which excludes the operation of ss 135 and 137 of the UEL. As the Committee previously noted in its submission to the Royal Commission:

“[Sections 135 and 137 of the UEL] are essential evidentiary gates that allow the court to ensure trials are fair. Indeed, the other changes proposed by the model amendments may be less problematic were the ultimate discretion to admit or limit the use of tendency and coincidence evidence retained.”

While s 100A(1) seeks to introduce some protections for an accused person, the Committee views these safeguards as inadequate.

¹⁸ *Uniform Evidence Law* dictionary.

¹⁹ Hamer (2016) *The admissibility and use of tendency, coincidence and relationship evidence in child sexual assault prosecutions in a selection of foreign jurisdictions*, (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney), 7.

The first limb of the s 100A(1) test – whether the evidence is ‘more likely than not to result in the proceedings being unfair’ – is problematic because it removes from consideration the central reason that tendency and coincidence evidence should be treated cautiously. Indeed, s 101A(2) states that evidence is ‘not unfair to a defendant in a child sexual offence proceeding merely because it is tendency evidence or coincidence evidence’. Accordingly, under the proposed test, evidence may be relevant to an IEI because it, in part, engages (unfairly prejudicial) tendency reasoning, but by operation of s 101A, it would not be considered unfair simply because it is tendency or coincidence evidence. In other words, s 101A would treat the evidence as fair, despite the fact that it may cause the jury to assess the evidence in an unfair way.

The second limb of the test – whether the giving of ‘appropriate directions to the jury about the relevance and use of the evidence will not remove the risk’ of unfairness – is also problematic. If the empirical evidence on the efficacy of jury directions is relied upon, it will be rare that directions will completely remove the risk of unfairness. Indeed, the Royal Commission’s jury reasoning study observed that ‘[t]he findings in this study are in line with a large body of empirical research demonstrating the ineffectiveness of most jury directions.’²⁰ Given this, the Committee queries the underlying assumption behind s 101A(1)(b) and instead suggests that it would be more appropriate to balance the risks associated with admitting such evidence with its probative value.

The Committee’s third and fourth concerns have been effectively addressed by ss 97(1A)(b) and 98(1A)(b) and the retention of the significant probative value test for witnesses other than the defendant. However, the Committee submits that the application of different tests to an accused and other witnesses creates a manifest unfairness. Indeed, although the legislation does not do so explicitly, the Committee submits that the creation of two separate tests of admissibility impugns the principle that an accused person is innocent until proven guilty.

The Committee’s fifth concern has been effectively addressed by s 96A (iv)(b) of Appendix E. As such the Committee now supports this amended provision.

Whilst the Committee appreciates the opportunity to make submissions in regard to reforming tendency and coincidence rules, the Committee reiterates its previous concern that changes to evidence rules are far-reaching and complex and must be considered in a holistic and thorough way. As such, the Committee reiterates its earlier submission that the Australian Law Reform Commission is the most appropriate body for review of this legislation and the model provisions.

²⁰ Goodman-Delahunty, Cossins, & Martschuk, (2016) *Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study*, (Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney) 28.

Concluding Comments

The Committee welcomes this review of the NSW criminal justice system and looks forward to the implementation of many of the Royal Commission's recommendations. The Committee recognises the importance of the criminal justice system in ensuring that offenders are appropriately punished and in recognising the damage suffered by victims of child sexual offending. However, the Committee wishes to emphasise that changes to the criminal justice system should not be implemented where their implementation would result in unfairness to defendants.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. Should you have any further queries, please do not hesitate to contact the undersigned.

Contact:

Alternate Contact:



Emily Ryan

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Liam Cavell

Chair

Criminal Law Committee

Email: crimlaw.chair@younglawyers.com.au