

22 December 2016

The Hon Justice Peter McClellan AM  
Chair, Royal Commission into  
Institutional Responses to Child Sexual Abuse  
GPO Box 5283  
Sydney NSW 2001

By email: [contact@childabuseroyalcommission.gov.au](mailto:contact@childabuseroyalcommission.gov.au)

Dear Judge,

### **Evidence (Tendency and Coincidence) Model Provisions**

Thank you for the opportunity to comment on the Evidence (Tendency and Coincidence) Model Provisions (**the Model Provisions**).

Given the timeframe for response, only certain Law Council Constituent Bodies have had an opportunity to fully consider the Model Provisions. The Law Council is grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society, the Law Society of the Australian Capital Territory, the Law Society of Tasmania and its National Criminal Law Committee in the preparation of this submission.

The Model Provisions have implications beyond the Royal Commission into Institutional Responses to Child Sexual Abuse's (**the Commission**) remit of child sexual abuse. The Model Provisions were released by the Commission on 25 November 2016.

The Law Council has previously raised concerns regarding proposed reforms to the admission of tendency and coincidence evidence in its submission on the Commission's Criminal Justice Consultation Paper (**the Consultation Paper**). Arthur Moses SC (Executive Member, Law Council) and members of the Law Council's National Criminal Law Committee, Tim Game SC (Co-Chair) and Stephen Odgers SC, also highlighted problematic features of the Model Provisions at the public hearing on 29 November 2016 and 2 December 2016.

For reasons outlined during its evidence before the Commission on 2 December 2016, the Law Council considers that such significant legislation requires detailed consideration and should be referred to the Australian Law Reform Commission (**ALRC**) for appropriate review, consultation and research. A number of the Law Council's Constituent Bodies, such as those referred to above, share this view.

In submissions to the Commission in relation to the Consultation Paper, the Law Council and Law Society of New South Wales urged caution with respect to reliance on the Jury Reasoning Study report to justify reform, particularly with respect to joinder of counts

and the reduction or removal of barriers to admissibility for tendency and coincidence evidence.

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, including the Jury Reasoning Study. 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.

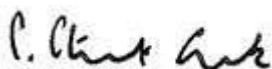
For example, the Law Society of Tasmania has noted that the Tasmanian Law Reform Institute (**the Institute**) released a Final report on this issue in 2012.<sup>1</sup> If there is to be changes to the law, the Law Society of Tasmania has suggested the proposals made by the Institute might be more appropriate than those now sought by the Commission.

The Law Society of New South Wales has also noted a further concern that the implementation of the Model Provisions may complicate and delay child sexual assault trials in New South Wales, thus undermining the positives of the other reforms (such as the current pilot program involving pre-recording of evidence of child sexual assault complainants and the use of witness intermediaries) and potentially affecting their evaluation.

The Law Council shares these concerns.

Should you wish to discuss this matter further or require further information, please contact Dr Natasha Molt, Senior Legal Adviser, on (02) 6256 3754 or [natasha.molt@lawcouncil.asn.au](mailto:natasha.molt@lawcouncil.asn.au)

Yours sincerely,



**S Stuart Clark AM**  
**President**

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<sup>1</sup> Tasmanian Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases With Multiple Complainants, Final Report 16* (February 2012), available at [http://www.utas.edu.au/\\_data/assets/pdf\\_file/0010/283816/HochFinalReport.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0010/283816/HochFinalReport.pdf)