Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018

Submission to Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

6 July 2018

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Who we are

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.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Committee's inquiry into the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018. The ALA supports the existence of a national redress scheme ('NRS') with the objective of minimising litigation and stress for the victims of child sexual abuse. However, there are aspects of the present proposed Scheme which cause us great concern.

National Redress Scheme and the Queensland response to the Royal Commission

Final Report – Queensland Government response

2. In the Queensland response at 7.4, the Government defers consideration of whether or not priests should be required to report sexual abuse of children disclosed in the confessional. South Australia and Tasmania have already announced that they will be applying their laws on reporting to the confessional. There seems no reason in principle why, if a child reports abuse and is at continuing risk, the priest should not have a clear legal (as well as an ethical) obligation to report this to police immediately. The obligation will be the same as that which would apply if an adult reported in a confessional that they were intending to kill a person. Mere counselling or attempted persuasion would manifestly not be an adequate response. The law should apply equally and the welfare of potential victims should come first.

3. We strongly support recommendation 12.7, that regular interviews should take place with children in care in the absence of the carer. The fact that children have had no-one to complain to without putting themselves at further and grave risk in the past has been manifest in all states and territories. The Queensland Government response does not reject but does not clearly adopt the terms of this recommendation and indicate how it would be applied.

4. Recommendations 15.11 and 15.12 relate to children in immigration detention. The Queensland Government accepts the recommendations in principle whilst noting that the recommendations are directed to the Commonwealth. The Royal Commission clearly did not expect or intend that children in immigration detention would be excluded from the national redress scheme. Such an outcome is unacceptable.

Redress and Civil Litigation Report – Queensland Government response

5. The Royal Commission recommended that redress scheme take into account physical, emotional and cultural abuse or neglect, as well as sexual abuse (recommendation 17). The Queensland Government says it accepts this recommendation in respect of the redress scheme. However, the limitation period was removed only in respect of sexual abuse and not in respect of physical and associated psychological abuse in Queensland. The Queensland Government's response is inconsistent and unacceptable.

6. The Royal Commission recommended that the maximum payment under the redress scheme be $200,000 (recommendation 19), whereas the Commonwealth decided on $150,000. Manifestly this is too low, particularly given that the average payout is expected to be about half this amount. It will force more cases to be run at common law, which is more distressing for victims and ultimately more costly for the state and for the institutions.

7. Recommendations 24 and 25 require not merely that any previous payment by institutions should be given credit against any amount under the redress scheme but that that payment should be adjusted for inflation. Given that any modest payment made is likely to have been spent quickly and not invested so as to increase, then the adjustment for inflation makes the small figure available under the redress scheme look even more inadequate. More victims will be likely to turn to common law. Queensland has indicated that it would accepted these recommendations.

8. Recommendation 45 sets out circumstances where child sexual abuse should be taken to have occurred in an institutional context. The *Prince Alfred College* case in the High Court accepted the principle (though not its application in that particular case) of the close connection test creating vicarious liability. The criteria set out in that recommendation are likely to give rise to vicarious liability and the Queensland Government would be stealing a march on other governments and the courts in recognising the inevitable next step in law. Those provisions should apply to common law litigation in Queensland, picking up those not in employment but in a sufficient relationship with the institution to justify vicarious liability.

9. Recommendation 48 states that the redress scheme should have no fixed closing date but the Commonwealth has put a limit of 10 years, though with the possibility of extension. The Queensland Government should advocate for the Royal Commission's recommendation given that the Royal Commission found, following some 6,000 interviews, that the average time from abuse to first reporting was 22 years. A 10-year period is manifestly inadequate.

10. Recommendation 60 states that three months should be available for an application to seek review of an offer or redress. The current scheme provides for at least 28 days but no longer than six months for a person to apply for review of a determination. It would be better if there was availability of independent legal advice prior to any time limit expiring and the time limit not expiring unless such advice has been provided.

11. At recommendation 63, it is to be made a condition of accepting a monetary payment under the redress scheme that a deed of release remove all further rights to seek common law compensation. Again, whilst the Queensland Government indicates that it will accept its recommendation, this should be conditional upon independent legal advice having been obtained first. Otherwise the potential for injustice is high.

12. Recommendation 89 proposes the imposition of a non-delegable duty on institutions in respect of institutional child sexual abuse despite it being the deliberate criminal act of a person associated with the institution. The Queensland Government's response is to say this is a matter for further consideration. The *Prince Alfred College* case has already determined that criminality does not prevent vicarious liability. The problem is that, as was found in *Lepore*, a non-delegable duty is still only a duty to take reasonable care and may even in some circumstances be delegable. Hence, the decision in *Lepore* was to keep vicarious liability open rather than the non-delegable duty. This reasoning led the UK Supreme Court in *Armes v Nottinghamshire County Council* [2017] UKSC 60 to reject a non-delegable duty but find vicarious liability on the part of a local government authority for abuse by foster parents in respect of children in care. Vicarious liability is strongly preferred.

13. Recommendations 91 and 92 would require liability in negligence but reverse the onus of proof. The Queensland Government's response is to leave these matters for further consideration.

14. Merely reversing the onus of proof is wholly inadequate. That onus could be met by the institution simply calling some evidence, suggesting that its response was adequate. The effective evidentiary onus would then shift back to the plaintiff, who would be required to establish fault and the case would be as lengthy, hard-fought and traumatic and expensive as ever. Reversal of the onus is, it is submitted, a wholly inadequate response and the Queensland Government can do better than the Royal Commission in this regard.

15. In recommendation 92, it was said that volunteers, agents and contractors and associated persons should be included for the purpose of vicarious liability on the part of an

institution. This gets around the *Ellis* defence that priests are not employed by the Catholic Church. The Queensland Government says that it will consider this. This is wholly and manifestly inadequate. Victoria and NSW have already indicated or legislated to overcome this problem.

16. Recommendation 94 makes an associated trust liable to pay damages and provides for a nominated defendant where an organisation (the Catholic Church being the prime example, using its *Ellis* defence) says that it is unincorporated and does not exist in law and, in any event, its assets are held by a separate arm which does not conduct its activities and cannot therefore be sued. The requirement that trusts be made liable and a defendant be required to be nominated has been adopted in Victoria and NSW and should immediately be adopted in Queensland. Again, these changes in law should be fully retrospective (as they will be NSW) and not prospective (as in part in Victoria), not least because of the average 22 years from abuse to first reporting.

Criminal Justice Report – Queensland Government response

17. In respect of the Royal Commission's Criminal Justice Report and the Queensland Government's response, recommendations 17 and 18 refer to blind reporting. The Police Integrity Commission inquiry in NSW found that the Catholic Church (a paid police officer having sat on their internal committee) reported blind on a large number of cases so that no useful police action could be taken without the name and contact details of the victim. The standard reporting form of the Church included an alleged wish that details not be given to police and although the Church alleged (without any evidence to support it) that they encouraged individuals to go to police, curiously, they could produce no evidence that anyone ever did. The suspicion is that blind reporting was a means of protecting the abusers and the reputation of the Church. If blind reporting is to be permitted, then the victim should have independent advice before making that decision rather than it being a de facto decision of the abusive institution. The Queensland Government can do better than the Royal Commission recommendation.

18. Recommendation 33 was for the introduction of a criminal offence of failure to report child sexual abuse in an institutional context. The Queensland Government merely has this under consideration. The Queensland Government should go down the path of the NSW Government in having an offence of failure to report serious criminal conduct to an appropriate authority (such as police). The Royal Commission was limited to child sexual

abuse and institutions but there is no rational reason for the response to be so limited. NSW has had such a provision (s 316 of the *Crimes Act*) for a lengthy period and this is the provision which has given rise to the conviction of the Catholic Archbishop of Adelaide in recent times.

19. Recommendation 35 recommends that the offence should apply to information in the confessional and for the reasons set out above, it should but again it should apply to all serious criminal offences and not merely child sexual abuse. If an individual was threatening or planning to kill their partner, then it would be wholly unacceptable that a priest not disclose this immediately to police.

20. The Royal Commission's recommendation 45 in relation to tendency or coincidence evidence has been said to be a matter for further consideration by the Queensland Government. It is appropriate that this provision apply but with the safeguards referred to in ALA submissions.

21. Recommendation 76 proposed that sentences for child sexual abuse should be set in accordance with sentencing standards at the time of sentencing instead of at the time of offending. The Queensland Government says this is for fur consideration. NSW has adopted an intermediate position, where sentencing is to adopt the current standard but the sentence is not to exceed the maximum applicable at the time of the offence. This seems like a reasonable compromise.

Conclusion

22. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry being conducted by the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee into the National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Bill 2018 (the Bill).

23. We believe that the establishment of a National Redress Scheme for Institutional Child Sexual Abuse has the potential to have a genuine positive impact on the lives of thousands of people whose lives have been affected by sexual abuse when they were children.

24. Many aspects of the National Redress Scheme will provide meaningful redress for survivors. Providing three forms of redress – a monetary payment, access to counselling and psychological services, and a direct personal response – will all contribute to healing, and ensure that survivors know that what has happened to them has been acknowledged as

wrong, and that there are also practical tools provided to assist with their healing. The proposed standard of 'reasonable likelihood' is appropriate and will minimise the level of re-traumatisation that is likely to arise as a result of engaging with the Scheme.

Yours Sincerely,

Greg Spinda

Queensland National President
Australian Lawyers Alliance

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Criminal Justice:

Responses to the Consultation Paper

Submission to the Royal Commission into institutional responses to child sexual abuse

31 October 2016

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The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the Consultation Paper on Criminal Justice Issues. This submission makes comments on Issues raised under the headings 'Encouraging Reporting', 'Blind Reporting', 'Failure to Report' and 'Role of the DPP'.

Encouraging Reporting

2. ALA comments in response to the issues raised under the above heading are discussed with the issue of failures to report, below.

Blind Reporting

3. Blind reporting has been asserted as being desirable to encourage victims to disclose their abuse and often to meet their wishes that the abuse not be publicised.
4. However, the evidence from Operation Protea and the subsequent NSW Police Integrity Commission (PIC) Inquiry in 2015 clearly implied that in many cases blind reporting was intended to protect the institution and the abuser, not the victim. Whilst there was evidence that contact persons were supposed to ask victims whether they want to go to the police, there was no evidence from contact persons or victims that this in fact occurred or what the response of victims really was. In the report at 5.284, there was evidence that the standard form given to victims asked whether they had notified police or attempted to notify police but did not explicitly record whether they wished the police notified or wished their identifying details to be withheld from police. The form did not say the victim had been encouraged to go to the police. This, however, was treated at least by the Church, as indicating an

intention that information about the victim to permit identification would not be provided to the police. However, in the Executive Summary at xvii:

> "The Commission accepts that an indicated unwillingness on the part of victims to make complaints to the police did not necessarily mean that the victims would be unwilling to cooperate with a police investigation, if one was commenced."

5. Further, blind reports were generally added into the police data base as information reports, purely for intelligence purposes, with many not being investigated by police.[2] As such, the utility in terms of punishing and preventing crime is negligible."
6. The Special Commission of Inquiry into matters relating to the investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle (the Maitland-Newcastle Inquiry) examined the failure by Father Brian Lucas to take admissions from an abuser to the police. The Maitland-Newcastle Inquiry's reason for not then referring him to the Department of Pubic Prosecutions (DPP) was that the victim had asked that the information not be disclosed. However, the evidence of the victim given to the Maitland-Newcastle Inquiry said that the victim was never asked by Father Lucas whether they wanted their complaint reported.[3]
7. Similarly in respect of the long history of blind reporting in which the NSW Police representative participated (presumably therefore an accessory after the fact) seems to have had little serious regard to the will, let alone the interests, of victims in having the crimes committed against them investigated and punished.

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[2] Police Integrity Commission, *Protea Report* (2015), https://www.pic.nsw.gov.au/Report.aspx?ReportId=162, xxii.

[3] Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle, *Report Volume 2*, (2014) [13.20]. The ALA has written to the NSW Attorney-General requesting that Father Lucas be prosecuted on the basis of the Inquiry's finding that "there is reliable evidence confirming that at the meeting McAlinden made admissions of having sexually abused children": Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle, *Report Volume 1*, (2014), 15.

8. It has been suggested that blind reporting is still continuing. Detective Inspector Fox has certainly indicated this is the case. The PIC merely recommended an urgent review of blind reporting in its report at 11.48, which clearly implies that it is continuing. Yet this is clearly criminal on the PIC's own findings at 11.45 and 11.46. If blind reporting is continuing, this is wholly unacceptable.
9. In our view, the victim's sensibilities can be appropriately and delicately handled by properly trained police. The wish to avoid publicity can often be achieved. However, the wishes of a victim must be subordinated to the interests of other potential victims who may suffer from the abuse not being reported.
10. In our view, and notwithstanding that it may discourage some complaints, blind reporting is unacceptable and should be clearly identified as inconsistent with the legal obligation relating to concealing serious indictable offences which, in NSW, is s316 of the *Crimes Act 1900* (discussed more fully below). This position was clearly articulated by the PIC in its Report to Parliament on Operation Protea:
    1. 'the Commission is of the opinion that these matters relied on as justifying blind reporting would not, in general, amount to a reasonable excuse within s 316(1) of the Crimes Act and that, in general, blind reporting contravenes s 316'.[4]
11. There are statutory requirements to report in respect of institutions such as schools and it is arguable that even the abuser as a teacher has him or herself a legal obligation to report injury to a child even if caused by that individual. The general obligation in the community should be no different.

[4] Police Integrity Commission, *Protea Report* (2015), https://www.pic.nsw.gov.au/Report.aspx?ReportId=162, xi.

Failure to Report

12. Misprision of felony was replaced in 1990 by s 316(1) of the *Crimes Act* 1900 (NSW). That provision adopts the words of Lord Denning in *Sykes v DPP* [1961] 3 WLR 371, apart from changing felony to serious offence and some other minor amendments, including giving the Attorney-General a discretion in some circumstances.
13. There have been a dearth of prosecutions, although one is currently underway against Archbishop Philip Wilson in respect of matters said to have occurred to his knowledge in Newcastle.
14. Suggestions have been made that s 316 should be amended or abolished. The ALA thinks that in substance, s 316 is appropriate, the obligation is one which should be on every citizen (subject to some exceptions for victims, legal privilege and perhaps the confessional), and would not wish to see it abolished. Indeed, the history of cover-up in institutions strongly suggests that the criminal offence should apply not just to individuals but to the institutions which have failed victims by exposing them to abuse and then, too often, protecting their abusers.
15. In our view, it is hard to see why serious criminal offences of all types should not be reported and not merely child sexual offences. Equally, it is appropriate to make institutions responsible as well as individuals, as discussed at page 30 of the Consultation Paper.
16. As to whether any penalty should lie with a victim who fails to report, we would suggest that there be a broad discretion as to whether or not any action be taken, having regard to the injury inflicted, psychological state and the particular circumstances of the individual. There will be many circumstances where children and indeed, some adults, could not reasonably be expected to report their own abuse. This will often be the case in Indigenous and Torres Strait Island communities, for example. On the other hand, individuals who were able to and could readily have reported and thus saved others, having reached adult years, should have an obligation to report appropriately. The involvement of an institution in the decision to report or withhold

information about the abuse from the police may be a relevant consideration, especially if the institution has discouraged or failed to explore the possibly of reporting the abuse with the victim.

17. It has been asked whether civil liability of the kind recommended in the Redress and Civil Litigation Report published by the Royal Commission in 2015, if implemented, would be sufficient. The ALA's answer is, resoundingly, no. We refer to the submissions we have provided to the Royal Commission in the past, including in response to Issues Paper 11 on the Catholic Church[5] and in response to the Consultation Paper on Redress and Civil Litigation.[6] The ALA is particularly concerned that the form of liability recommended with respect to organisations such as the Roman Catholic Church will be ineffective in securing compensation in the event that liability is disputed, such as in the *Ellis* case.

18. In respect of the Roman Catholic Church, under the various legislative regimes in all parts of Australia, all of the assets are held by trustees and the Church lacks any legal entity. The *Ellis* defence[7] means that this legal arrangement renders the Roman Catholic Church able to evade its responsibilities to individuals injured by the actions of priests or other associated persons. Whilst unincorporated associations can be sued at common law, in *Ellis* it was held that the Church is too amorphous to permit nominated representatives to be sued. Effectively it, and more significantly its enormous assets, are immune from suit. In every diocese in Australia the assets of the Catholic Church are held by trustees. Until the *Ellis* decision, the Church accepted that its trustees were the appropriate body to sue. In England and Wales that continues to be the Church's position, where the trustees are regarded as the Church's secular arm.

[5] http://www.lawyersalliance.com.au/documents/item/634.
[6] http://www.lawyersalliance.com.au/documents/item/353.
[7] In this case, the Roman Catholic Church was able to avoid paying compensation to a survivor of child sexual abuse due to the administrative arrangements under which the assets of the Church were held by a trust: *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117.

19. Lest it be thought that the Catholic Church will no longer take the *Ellis* point, we draw attention first to the undertakings given by the Archbishops of Melbourne and Sydney on behalf of all bishops in Australia.

20. In a speech of 15 July 2015 to the Triennial Assembly of the Uniting Church in Australia, the Hon. Justice Peter McClellan AM said:

> 'In his evidence to the Royal Commission in the case study concerning the Melbourne Response Denis Hart, the Archbishop of Melbourne, stated that the Melbourne Archdiocese has recommended that the Church, throughout Australia, provide an entity for survivors to sue. The Truth, Justice and Healing Council, in submissions to the Commission, has recommended that legislation be enacted requiring unincorporated associations to establish or nominate an entity to be the proper defendant to any claims of child sexual abuse brought against the institution. The Archbishop of Sydney, Anthony Fisher, has stated publicly that it is the "agreed position of every Bishop and every leader of a religious congregation in Australia that we will not be seeking to protect our assets by avoiding responsibility in these matters" and that "anyone suing should be told who is the appropriate person to sue and ensure that they are indemnified or insured so that people will get their damages and get their settlements".'

21. In a press release by the Truth, Justice and Healing Council, quoting Francis Sullivan and dated 22 May 2015 (less than a week later), it was said that:

> 'If a survivor wants to take a claim to court, then at the very least they must have an entity to sue.'
>
> '... The Church position in relation to the identification of a proper defendant in civil claims calls for:

> The enactment of legislation in the states and territories imposing a requirement on an unincorporated association which appoints or supervises people working with children to establish or to nominate a body corporate to be the proper defendant to any claims of child sexual abuse brought against the association.
>
> The identity and corporate structure of the body corporate should be left to the institutions to determine in accordance with their internal structures, provided that the body corporate has sufficient assets or is appropriately insured or indemnified.'

22. The press release quoted Archbishop Fisher as saying, '... the *Ellis* defence is no longer a legal tactic used within his archdiocese.'

23. Unfortunately, it appears that the Church has recanted on these undertakings.

24. Several bishops have refused requests from media organisations to undertake that they will not rely upon the *Ellis* defence, according to Fairfax articles published on 18 May 2015.[8]

25. Further, the Archdiocese of Sydney issued in late 2015 a document entitled 'The *Ellis* Decision - a Restatement of the Law' and saying 'There is no such thing as the "*Ellis* defence". The *Ellis* decision did not create new law.'[9]

26. This document is currently on the website of the Archdiocese of Sydney. It goes on to assert:

[8] Chris Vedelago, Cameron Houston, "Church to block victims' court bids despite promise to abandon practice by Pell", *The Age*, 18 May 2015, available at http://www.theage.com.au/victoria/church-to-block-victims-court-bids-despite-promise-to-abandon-practice-by-pell-20150517-gh3jkr.html.

[9] Sydney Catholic Archdiocese "The Ellis Decision – a Re-statement of the Law", [undated], available at https://www.sydneycatholic.org/justice/royalcommission/ellis.asp.

> 'While the court found that the body corporate was not responsible for the assistant priest, it did not set up a so-called "*Ellis* defence" or any new law. This decision is consistent with the longstanding rule of law that you cannot be liable for the criminal actions of others unless you are directly or indirectly responsible for supervising their conduct, and there has been negligence or other actionable conduct.'[10]

27. In a press release from Francis Sullivan of the Truth, Healing and Reconciliation Council, it was said that the Church should assist victims to find someone to sue.[11]

28. The point of the *Ellis* defence is that in many of these cases, there will be no-one to sue. Refusing to acknowledge that the *Ellis* defence exists indicates that Church officials will continue to protect Church assets from survivors of childhood sexual abuse seeking to sue it if they so choose.

29. The ALA acknowledges the limitations that might exist as a result of the organisational structure of the Catholic Church in Australia. We believe, however, that it is not sufficient that the rights of survivors of child sexual abuse to sue the institution that facilitated that abuse will depend on the attitude of the diocese or archdiocese in question.

30. Given the statements outlined above, it is clear that legislative change is required. In this regard we refer to our submission to the Royal Commission's Issues Paper 11.[12] In that submission, we supported recommendations 89, 91, 92 and 94 of the Final Report on Redress and Civil Litigation as minimum benchmarks. We further recommended that the legislation recommended in 94 should be modelled on the *Roman Catholic*

[10] Sydney Catholic Archdiocese "The Ellis Decision – a Re-statement of the Law", [undated], available at https://www.sydneycatholic.org/justice/royalcommission/ellis.asp.
[11] Truth Justice Healing Council, *Media Release: Senior Church leaders commit to no Ellis Defence*, 22 May 2015, http://www.tjhcouncil.org.au/media/102237/150522-MEDIA-RELEASE-Senior-church-leaders-commit-to-no-Ellis-defence.pdf.
[12] http://www.lawyersalliance.com.au/documents/item/634.

Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW). While the limitations provisions in that Bill are now superfluous in NSW and Victoria,[13] other provisions constitute a fair basis for ensuring liability for historical sexual abuse claims.

The Role of the DPP

31. The role of the DPP is clearly key in ensuring that perpetrators of crimes are prosecuted.
32. Historically, however, DPPs have at time played an obstructive role in terms of pursuing prosecutions in instances of child sexual abuse. There have been numerous instances of this nature brought to light since the advent of the Royal Commission, and earlier in the Maitland-Newcastle Inquiry.
33. Royal Commission Case Study 15 presents a useful illustration regarding the types of challenges that can exist in seeking prosecutions for historical sexual abuse. In that Case Study, there were numerous factors that inhibited prosecution, despite a strong desire for prosecutions on the part of the victims who had come forward. Some of these factors included:
    - Unusual contact between the Office of the DPP and defence lawyers, including the DPP accepting statements from the lawyers on the condition that the statements not be used in the prosecution;
    - Basing the decision not to prosecute on 'medically misinformed'[14] advice; and
    - Assumption that prosecuting perceived 'minor' offences would corrode public confidence in the office of the DPP.

[13] The ALA advocates for the adoption of legislation mirroring that of Victoria and NSW in relation to limitations periods for historical child abuse in all jurisdictions in Australia.
[14] Royal Commission into institutional responses to child sexual abuse, *Report of Case Study No. 15*, 2015 (Case Study 15 Report), 93

34. Many of these problems emanated from the advice of one of the most senior prosecutors in Australia. As such, it is not just a matter of better supervision ensuring better outcomes in decisions whether or not to prosecute. Rather, a system of independent review could be usefully implemented to safeguard against the risk of DPPs deciding not to prosecute cases in which prosecutions would be possible and beneficial.
35. The Case Study also highlighted a number of procedural concerns with the role that the DPP played in the decision not to prosecute. These concerns largely centred on involvement of victims in the process, including keeping them informed of decision-making. Many of these concerns would have been ameliorated had the Office followed its own protocol.
36. In England and Wales, the Victim's Right to Review Scheme (VRRS) offers a useful model that could be adopted in Australia to ensure that mistakes such as those outlined above, and others, do not operate to stop prosecutions that should proceed. Under that system, victims of crime are able to request a review of a decision not to prosecute. If such a request is made, the case will be looked at afresh by an investigator unrelated to the initial investigation.
37. The Royal Commission held a round-table discussion in April 2016, inviting representatives of Commonwealth, state and territory prosecutions offices and victims' rights offices, including all Directors or Deputy Directors of Public Prosecutions, to discuss decision making within DPP offices.
38. This round-table examined the procedures in place for all jurisdictions in Australia when making decisions whether or not to prosecute alleged perpetrators and the role of victims in prosecutions processes. It compared these procedures with those that exists in England and Wales, as outlined above.
39. When compared with the clear rights and protocols that exist in England and Wales, the various Australian systems appear haphazard. Different jurisdictions have different levels of formality and victim engagement in review options. While all provide some avenues for review, all would benefit from clearer procedures. As can be seen from

Case Study 15, the existence of procedures itself does not ensure that they will be implemented. A formal review mechanism would be much more likely to achieve compliance. Uniformity across jurisdictions would also be a positive development.

40. Reviewability of decisions not to prosecute was considered at length by the Royal Commission round table. The real strength of the system in England and Wales, according to participants, was the combination of reviewability, victim engagement, and the clear procedures that exist concerning both reviewability and engagement.[15]
41. Anecdotally, it appears that the quality of all prosecutions decision-making has been enhanced by the existence of the VRRS, although there is no data available to verify that. As well as providing feedback to the areas whose decisions have been reviewed, the unit provides training for prosecuting rape and serious sexual offences, and information about regular issues it confronts. As such, a centre of expertise developed.[16]
42. Most Australian jurisdictions incorporated automatic review into the initial decision-making process, by way of a supervision. Before a decision not to prosecute is taken, the lawyer with carriage of the matter will usually consult at least with their supervisor and often more senior colleagues will review the file and decision-making process. This contrasts with the procedure in England and Wales, whereby review of the first decision-maker is only undertaken as a part of the review process.[17] There is a capacity to review decisions not to prosecute in the first instance across the jurisdictions. Victims' access to information about this avenue vary, however, undermining the value of the system.
43. The existence of human rights legislation was flagged as a possible mechanism facilitating judicial review of decisions not to prosecute. South Australia's Commissioner for Victims' Rights, Michael O'Connell APM, noted that the persuasive

[15] Criminal Justice Transcript, see above note 17, 81, 85-6.
[16] *Ibid*, 32, 34, 36.
[17] *Ibid*, 102.

law from Europe may give rise to successful arguments for judicial review in the ACT in Victoria.[18]

44. While jurisdictions in Australia on balance may have more supervision of decisions as to whether to prosecute a crime, the independence of the review afforded by the England and Wales system remedies the concerns outlined in Case Study 15. The England and Wales system further benefits from a formal victim engagement process, including formalised notification of rights to appeal, meaning victims are not so much at the mercy of the particular investigating authority or officer.[19]

Recommendations

The ALA makes the following recommendations in response to the Royal Commission's Criminal Justice consultation paper:

- Blind reporting should be prohibited, in view of the fact that the primary beneficiary of this practice has been institutions connected with abusers of children, rather than victims and survivors. The ALA believes that form of reporting falls foul of legislation prohibiting the concealment of an offence, and thus leaves both reporters and police who accept such reports liable for prosecution.
- The issue of whether there should be a penalty imposed on victims who do not report abuses against them must be handled sensitively. There will be many victims who feel unable to report abuse due to mental health, cultural, religious, family or other reasons. It would not be appropriate to impose penalties on such individuals for failing to report. However, it must be acknowledged that a failure to report may give rise to later incidents of abuse if an abuser is able to continue to have access to children. The ALA believes that reporting should be required, but

[18] *Ibid*, 76.

[19] Royal Commission into institutional responses to child sexual abuse, *Public Hearing – Criminal Justice DPP complaints and oversight mechanisms*, Round Table transcript 29 April 2016 (Criminal Justice Transcript), 81, 85-6.

there should be broad discretion not to prosecute, having regard to social, cultural, family and psychological circumstances which might reasonably explain the failure to report. The discretion would need to be exercised sympathetically in respect of victims.

- There is a need for national consistency and merits review of decisions of DPPs not to prosecute historical sexual abuse. The system currently in place in England and Wales presents a useful model to emulate in Australian jurisdictions.
- Human rights legislation in all jurisdictions could be a useful development in ensuring that rights are appropriately balanced between victims and alleged perpetrators in navigating criminal justice solutions to child sexual abuse.

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.

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[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

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, [redacted]

Yours sincerely,

Tony Kenyon
Australian Lawyers Alliance
National President