**Evidence and**

**Jury Directions**

**Evidence**

The Consultation Draft of the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (the Consultation Draft Bill) contains amendments to change the test for admissibility of propensity and relationship evidence under the *Evidence Act 1977* (Evidence Act). These changes are proposed to implement recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its Criminal Justice Report.

## **What did the Royal Commission recommend?**

The Royal Commission made a number of recommendations aimed at facilitating greater admissibility of tendency and coincidence evidence and joint trials in criminal proceedings for sexual offences against children[[1]](#footnote-1).

Tendency and coincidence evidence are concepts under the Uniform Evidence Law (UEL). Queensland does not operate under the UEL. In Queensland, the relevant concepts are propensity evidence and similar fact evidence which are based on the common law.

Propensity evidence in criminal cases points to the character, reputation or behavior of a person to show that a person has a tendency to act or think in a particular way. Similar fact evidence is evidence of similar conduct used to show that a person acted or thought a particular way, because the similarities between multiple events make it improbable those events occurred coincidentally.

Relationship evidence covers evidence of other misconduct by the defendant towards the victim and can be used to prove a sexual interest or to provide answers to questions about the background to an incident.

## **What is the position in other jurisdictions?**

A national Council of Attorneys-General (CAG) working group, led by New South Wales, is considering the Royal Commission’s recommendations in relation to tendency and coincidence evidence. On 28 June 2019, CAG members representing UEL jurisdictions agreed to the working group drafting a model bill to implement reform proposals to the admissibility of tendency and coincidence evidence and to consult with key stakeholders.

**What is Queensland proposing?**

The Royal Commission’s recommendations provide an opportunity to reform this complex area of law in Queensland based on the approach in Western Australia, which is currently also not a UEL jurisdiction.

Western Australia’s *Evidence Act 1906* provides that propensity and relationship evidence is admissible in proceedings for an offence if the court considers that it would have significant probative value and “that the probative value of the evidence compared with the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial”.

## **Supplementary Proposals**

The following supplementary reforms are also proposed having regard to the work undertaken by the national CAG working group:

1. Amendments to ensure that a jury should not be directed as to the standard of proof required for propensity evidence; and
2. Amendments to clearly recognise that propensity evidence can cover circumstances where there are similarities in the accounts of multiple witnesses that make it improbable that they are lying.

# Jury Directions

The Consultation Draft Bill also reforms certain judicial warnings and directions given to juries.

## **What did the Royal Commission recommend?**

The Royal Commission recommended state and territory governments review and, if necessary, appropriately reform legislation to restrict the giving of judicial directions and warnings to juries in child sex matters in relation to the following issues:

* The effect of delayed complaint on a complainant’s credibility (Kilby/Crofts warning);
* The effect of delayed complaint on an accused person’s ability to prepare their defence (Longman Direction);
* Reliability of uncorroborated evidence; and
* Reliability of children’s evidence. [[2]](#footnote-2)

With the exception of the Longman[[3]](#footnote-3) and Kilby/Crofts[[4]](#footnote-4) directions, Queensland largely already complies with recommendation 65 in the Criminal Justice Report.

## **What is Queensland proposing?**

Amendments are proposed to the Evidence Act and the Criminal Codeto require:

* that if a trial judge is satisfied that an accused person suffered a significant forensic disadvantage because of the delay in prosecuting a charge (including any delay in reporting the alleged offence), the trial judge must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence;
* that a significant forensic disadvantage will not be established by the mere fact of delay alone;
* that a trial judge may refuse to give a warning or explanation if there are good reasons for doing so; and
* that expressions such as ‘dangerous or unsafe to convict’ and ‘scrutinise with great care’ may not be used in warnings given to juries in certain circumstances.

Further reading:

For more details on the Royal Commission recommendations: <https://www.childabuseroyalcommission.gov.au/media-releases/report-criminal-justice-released>

**Submissions on the Consultation Draft Bill are due by 5pm Friday, 20 September 2019 to** [**childsexualoffencesreform@justice.qld.gov.au**](mailto:childsexualoffencesreform@justice.qld.gov.au) **or GPO Box 149 BRISBANE QLD 4001. For more information visit** [**www.GetInvolved.qld.gov.au**](file:///C:\Users\woodcj\Desktop\www.GetInvolved.qld.gov.au)

1. Recommendations 44-51 [↑](#footnote-ref-1)
2. Recommendation 65 [↑](#footnote-ref-2)
3. *Longman v R* (1989) 168 CLR 79 [↑](#footnote-ref-3)
4. *Kilby v R* (1973) 129 CLR 460 and *Crofts v R* (1996) 186 CLR 427 [↑](#footnote-ref-4)