Department of Justice
Office of Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001
By email: legislation.development@justice.tas.gov.au

4 July 2017

Dear Department of Justice

Draft Evidence and Related Legislation Amendment Bill 2017

Thank you for the opportunity to provide comment on the above draft Bill to amend the *Criminal Code Act 1924* and the *Evidence Act 2001*.

The Draft Bill:

1. Amends the *Criminal Code Act 1924* (*Criminal Code*) to:
   - establish a presumption that when two or more charges for sexual offences are joined together in the same indictment those charges are to be tried together; and
   - provide that this presumption is not rebutted merely because evidence on one charge is inadmissible in relation to another charge.

2. Amends the *Evidence Act 2001* (*Evidence Act*) to provide that the issue of concoction, contamination and suggestion is not relevant to the admissibility of tendency and coincidence evidence under sections 97 and 98 of the Act.

My consideration of the draft Bill has been informed by the Australian Law Reform Commission Report *Family Violence – A National Legal Response*[1](ALRC), the Tasmania Law Reform Institute Report *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants* (TLRI) and the work of the Royal Commission into Institutional Responses to Child Sexual Abuse.

Criminal Code amendment

I note that the proposed amendment to the *Criminal Code* is consistent with the ALRC's Recommendation 26-5 which aims to encourage joint trials in sexual assault proceedings thereby reducing the potential trauma associated with the criminal justice process for complainants. It is also consistent with the TLRI's Recommendation 3 which bases its wording on the ALRC recommendation.

[1] http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114

L1 – 119 Macquarie St
Hobart TAS
Australia 7000

GPO Box 708
Hobart TAS
Australia 7001

childcomm@childcomm.tas.gov.au
+61 (0)3 6166 1366
www.childcomm.tas.gov.au

I understand that where separate trials are held in relation to child sexual abuse cases involving multiple incidents and multiple complainants, children involved may be required to give evidence on multiple occasions either as the complainant or as a witness in trials all concerning the same accused. By establishing a presumption that where two or more charges for sexual offences are joined in the same indictment, they will be tried together, the potential trauma for child complainants associated with the proceedings is likely to be minimised.

I am advised that a number of jurisdictions have already introduced a presumption for joint trials in sexual offences. Notwithstanding the presumption for a joint trial, it will still be open to the Court to make an order for separate trials where there are valid reasons to do so.

Evidence Act Amendment

As I understand it, the possibility that complainants may have concocted their evidence remains central to the court's consideration of the admissibility of tendency and coincidence evidence under the *Evidence Act* in Tasmania. So, for example, where complainants in multiple sexual assault cases are known to one another, one child's evidence will only be admissible in another child's case if the possibility of concoction is ruled out. This can be extremely difficult to establish, especially for example where complainants are siblings or students at the same school.

As the ALRC said in its report:

> 27.199 This assumption is based on the common law's traditional belief that children are unreliable witnesses, prone to fantasy and highly suggestible—a view that may still prevail despite the fact that it is not supported by the psychological literature. Recent literature is said to show that 'children are highly resistant to abuse suggestions and do not readily make up stories of sexual abuse even when given the opportunity to do so'.

The issue of concoction is often determined by a court following a pre-trial hearing, meaning that child complainants may be required to give evidence before the commencement of the trial. This increases the potential for trauma and distress associated with the criminal justice process.

The TLRI reached the conclusion in its 2012 paper that the possibility of concoction should be a question left to the jury rather than forming part of the admissibility test for evidence. This would allow the jury (as fact-finder) to determine the weight to be attached to the evidence and would also allow them to have a more complete picture of the circumstances of the offence.

I am advised that the proposed amendment to the *Evidence Act* is intended to move the law in Tasmania towards how it is already applied in other jurisdictions in Australia, including Uniform Evidence Act jurisdictions.

This amendment has specific relevance to sexual offence proceedings although I note that it will have application in other types of proceedings.

Conclusion

As Commissioner for Children and Young People, my focus is on the wellbeing of children and young people in Tasmania. Sexual offending against children is a serious and grave issue which causes long term social and emotional costs to children, their families and our community at large.

Any law reform such as this which aims to strike a more appropriate balance between the rights of children who are complainants in sexual assault matters and the right of defendants to have prejudicial material excluded, is to be supported.

Thank you for the opportunity to comment.

Yours faithfully

Mark Morrissey
Commissioner for Children and Young People

cc Minister for Human Services, the Hon Jacquie Petrusma

cc Acting Attorney-General and Minister for Justice, the Hon Matthew Groom