

COMMUNITY LEGAL CENTRES TASMANIA

11 June 2024

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001
attn: Secretary

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,
Re: *Justice Miscellaneous (Commission of Inquiry) Bill 2024*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Justice Miscellaneous (Commission of Inquiry) Bill 2024* ('the Bill') which will amend a number of Acts including the *Police Offences Act 1935* (Tas), the *Criminal Code Act 1924* (Tas) and the *Sentencing Act 1997* (Tas).¹ We acknowledge the Government's commitment to better protect children, improve the law's response to victim-survivors of child sexual abuse and hold offenders to account.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

- ***Apologies for institutional child sexual abuse***

Tasmania's Commission of Inquiry ('the Commission of Inquiry') reported that many victim-survivors who shared their experiences wanted an apology or recognition of the harm suffered.² Whilst many institutions may want to apologise for past child sex abuse, the fear that it may be used against them in court proceedings means that many may be reluctant. As a result, the Commission of Inquiry recommended that institutions be able to offer apologies without it being able to amount an admission of liability.³

The amendments set out in clause 5 of the Bill will ensure that apologies for institutional child sex abuse can be made without amounting to an admission of guilt. Relevantly, the

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

² Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children - Volume 7: The justice system and victim-survivors* (August 2023) at 135.

³ *Ibid*, recommendation 17.4.

proposed amendments have already been adopted in every jurisdiction in Australia except Tasmania and the Northern Territory.⁴

However, it is worth noting that on a cursory glance, the *Civil Liability Act 2002* (Tas) appears to exclude the State. This is because the Act expressly defines 'organisation' as "any organisation, whether incorporated or not, and includes a public sector body but does not include the State".⁵ A more careful review makes clear that government departments will be able to apologise.⁶ It is therefore recommended that the Government give some thought to amending the Act to make clear that the State will be able to issue apologies in institutional child sexual abuse cases or alternatively, an education campaign accompany the reforms.

We also believe that apologies should form part of a suite of policies adopted by government departments to make civil litigation less traumatic for victims. We recommend that whole-of-government guidelines are implemented when responding to civil litigation involving child abuse, as occurs in Queensland.⁷ Whilst the making of apologies will form part of the response, adherence to the guidelines is likely to result in a more compassionate and consistent approach being adopted. Relevantly, whole-of-government guidelines were recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.⁸

- ***Criminal Law Terminology and Offences***

We support the proposed amendments to remove references to 'sexual relationships' between adults and children in clause 9(e) and (f) of the Bill and replacing them with terminology referring instead to sexual abuse or unlawful sexual acts. We believe that the terminology proposed better reflects community expectations and accurately describes the crime alleged to have been committed.

Clause 9(a) of the Bill introduces a new offence to cover indecent acts with or directed at a child or young person under the age of 18 by a person in a position of authority. The proposed new offence was recommended by the Commission of Inquiry.⁹ We support the new offence but are concerned that similar age defences will not be available when the

⁴ Section 14J of the *Wrongs Act 1958* (Vic); Part 2.3 of the *Civil Law (Wrongs) Act 2002* (ACT); Part 10 of the *Civil Liability Act 2002* (NSW); Part 1A of the *Civil Liability Act 2003* (Qld); Division 12 of the *Civil Liability Act 1936* (SA); Part 1E of the *Civil Liability Act 2002* (WA).

⁵ Section 49C of the *Civil Liability Act 2002* (Tas).

⁶ Section 49N(3) of the *Civil Liability Act 2002* (Tas) provides that where proceedings are brought against an unincorporated organisation -which is defined as including government departments- the State is taken to be appointed as the proper defendant.

⁷ Queensland Department of Justice and Attorney-General, Whole-of-Government guidelines for responding to civil litigation involving child abuse (November 2022). As found at <https://www.justice.qld.gov.au/about-us/services/general-counsel/legal-services-coordination-unit/legal-service-directions-and-guidelines/whole-of-government-guidelines-for-responding-to-civil-litigation-involving-child-abuse> (Accessed 5 June 2024).

⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse - Redress and Civil Litigation Report* (Commonwealth Government: 2015) at 60.

⁹ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children* - Volume 7: The justice system and victim-survivors (August 2023), recommendation 16.9.

defence does apply to other offences in the *Criminal Code*. For example, both sections 124 and 125B of the *Code* provide identical defences:¹⁰

(3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

We recommend that a similar age defence is available for the new offence set out in clause 9(a) of the Bill.

Finally, we support clause 9(g) of the Bill which will make clear that the offence of ‘failure by a person in authority to protect a child from a sexual offence’ does not apply to children.

- Jury Directions

Educative jury directions can be important in improving the fairness of criminal justice and the experience of survivors in the criminal justice system as well as addressing misconceptions about sexual abuse. In 2010, the Australian Law Reform Commission and the New South Wales Law Reform Commission jointly recommended that a standard approach to jury directions about children’s abilities as witnesses and responses to sexual abuse be introduced in every Australian jurisdiction.¹¹ Almost fifteen years later, the Royal Commission noted that “very little seems to have been done” and recommended that jury directions be introduced as a priority in all Australian jurisdictions.¹²

The proposed section 371C jury direction will require trial judges to explain to juries the difficulties child witnesses often face in giving evidence in court, including where the reliability or credibility of the child witness is likely to be an issue. The jury direction is based on section 44N of the *Jury Directions Act 2015* (Vic) and was recommended by the Commission of Inquiry.¹³ Whilst it is likely that the Victorian reforms were the result of consultation, we call on the Department of Justice to comprehensively engage with Tasmanian academics, prosecution and defence lawyers and the judiciary as part of this process.

¹⁰ Also see section 125D of the *Criminal Code Act 1924* (Tas).

¹¹ NSW Law Reform Commission, *Family Violence: A National Legal Response* (Report 128: 2010), recommendation 27-11.

¹² *Royal Commission into Institutional Responses to Child Sexual Abuse – Criminal Justice Report – Executive Summary and Parts I and II* (Commonwealth Government: 2015) at 92-93.

¹³ Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children - Volume 7: The justice system and victim-survivors* (August 2023), recommendation 16.15.

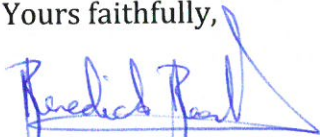
- ***Tendency and Coincidence Evidence***

The Commission of Inquiry noted that it is often difficult to prove beyond reasonable doubt that child sexual abuse has occurred, particularly where the only evidence of the abuse is the victim-survivor's evidence.¹⁴ Clauses 9, 12 and 13 of the Bill expand the admissibility of tendency and coincidence evidence so that where an accused is acquitted of a family violence or sexual offence in the Magistrates Court because the prosecution does not proceed with the charge, the acquittal of the first charge will not prevent the admitting of the evidence during the hearing of another family violence or sexual offence.

Whilst we acknowledge that these amendments were recommended by the Commission of Inquiry,¹⁵ we are concerned that the proposed reforms may result in further trauma to victim-survivors and other witnesses as a result of having to give evidence in relation to previous acts of alleged sexual offending that were discontinued by the prosecution. In some cases, the acquittal may have been the result of a victim-survivor or witness not wanting to give evidence. We are also concerned that the proposed reforms may allow evidence to be heard about acts which occurred when the accused was a child. We therefore recommend that acts committed when the accused was a child be excluded from the proposed reforms.

If you have any queries, or we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

¹⁴ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children - Volume 7: The justice system and victim-survivors* (August 2023) at 74-77.

¹⁵ *Ibid.*, at 90.