Tasmanian Council of Social Service Inc.

Justice Miscellaneous (Royal Commission Amendments) Bill

October 2022

TasCOSS

INTEGRITY
COMPASSION
INFLUENCE

About TasCOSS

TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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Introduction

Thank you for the opportunity to provide feedback to the Department of Justice ('the Department') in relation to the Justice Miscellaneous (Royal Commission Amendments) Bill 2022 ('the Bill').

The Bill proposes changes to several pieces of legislation in response to recommendations relating to criminal justice reforms made by the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission').

Our submission is not a comprehensive review of all proposed changes, but will instead focus on the following key issues:

- Introduction of a new offence and a presumption in relation to consent in the *Criminal Code Act 1924* (Tas) created by clause 7;
- Changes to the *Police Offences Act 1925* (Tas) to remove the offence of 'indecent assault';
- Changes to the *Justices Act 1959* (Tas);
- Provisions relating to the witness intermediary scheme, including proposed changes to the *Criminal Law (Detention and Interrogation Act 1995* (Tas);
- Changes to the *Evidence Act 2001* (Tas)
- General comments in relation to the current consultation

Proposed changes to the *Criminal Code Act 1924* (Tas)

1. Introduction of a new offence

The Bill introduces the following new offence:

125E. Failure by a person in authority to protect a child from a sexual offence

(1) A person (the accused person) is guilty of a crime if –

(a) the accused person occupies a position within, or in relation to, a relevant organisation; and

(b) the accused person knows that there is a substantial risk that a relevant child will become the victim of a sexual offence committed by another person who is

(i) 18 years of age or more; and

(ii) associated with the relevant organisation; and

(c) the accused person, by reason of the person's position, has the power or responsibility to reduce or remove that risk; and

(d) the accused person wilfully or negligently fails to reduce or remove that risk.

The introduction of an offence in relation to institutional failures to protect children from harm was a criminal justice recommendation from the Royal Commission, which noted that, '[m]any of our case studies reveal circumstances where steps were not taken to protect children in institutions. These include examples where persons were allowed to continue to work with a particular child after concerns were

raised, and they continued to abuse the particular child. They also include examples where persons who had allegations made against them were allowed to continue to work with many other children and they went on to abuse other children.'[1] The Royal Commission also noted that, '[u]nlike a duty to report, a duty to protect is primarily designed to prevent child sexual abuse rather than to bring abuse that has occurred to the attention of the police… [and] could apply to action taken or not taken before it is known that an offence has been committed'.[2] In response to these harms, the Royal Commission recommended all Australian jurisdictions introduce an criminal offence for responsible adults within institutions who fail to act protectively towards children.

TasCOSS is supportive of a failure to protect offence which is targeted towards institutions and institutional failures to respond appropriately to harm and/or potential harm to children. We believe the definition provided for 'person associated' is also an appropriate limitation to the offence,[3] and will hopefully ensure the offence is not interpreted to apply to individuals or families receiving services from an organisation. However, as this offence is directed at institutional failures and/or harm, we also recommend the Bill include a provision explicitly excluding kinship and foster carers, as recommended by the Royal Commission.[4]

Recommendation:

- The Bill should stipulate (either in the definition of 'person associated' or as an exemption) that the offence cannot be committed by foster or kinship carers.

2. Presumption as to lack of consent

The Bill introduces a new provision into the *Criminal Code Act 1924* (Tas) in relation to the presumption of consent in sexual relationships between young people and people in positions of authority:

126A. Presumption as to lack of consent to sexual conduct

(1) It is presumed, unless the contrary is proved, that a person under 17 years of age or a person with a mental impairment is unable to consent to sexual conduct with a person who is in a position of authority in relation to that person.

(2) For the purposes of subsection (1), a person is in a position of authority in relation to another person if, by reason of the position that they occupy within a relevant organisation, within the meaning of section 125E, that person has –

(a) authority, power or control over the other person; or

(b) the trust of the other person; or

(c) the ability to achieve intimacy with the other person.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 54.

[2] Ibid, 55.

[3] Justice Miscellaneous (Royal Commission Amendments) Bill 2022, cl 7: *person associated, in relation to a relevant organisation, includes but is not limited to a person who is an officer, employee, manager, owner, volunteer, contractor or agent of the organisation but does not include a person only because the person receives services from the organisation.*

[4] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 56.

Offences relating to those in positions of authority were strongly supported by the Royal Commission, who noted that, '[i]nstitutional child sexual abuse often involves perpetrators who are in a position of authority in relation to their victim or victims. For example, foster parents who abuse their foster children, teachers who abuse their students and priests who abuse children in their congregations are in positions of authority in relation to their victims.'[5]

Whilst TasCOSS supports the introduction of this provision, we believe this is a provision which should apply to adults who are in positions in authority in relation to young people (for example, sporting coaches or teachers), rather than an offence which could potentially apply to young people in relation to other young people (for example, a young person who is a leader in a youth group). We therefore recommend the provisions be amended to change the word 'person' to 'adult'.

Recommendation:

- The wording of the provision in the Bill should be changed to substitute the word 'adult' for person (changes italicised):
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(1) It is presumed, unless the contrary is proved, that a person under 17 years of age or a person with a mental impairment is unable to consent to sexual conduct with ***an adult*** who is in a position of authority in relation to that person.
(2) For the purposes of subsection (1), ***an adult*** is in a position of authority in relation to another person if, by reason of the position that they occupy within a relevant organisation, within the meaning of section 125E, that ***adult*** has –

(a) authority, power or control over the other person; or
(b) the trust of the other person; or
(c) the ability to achieve intimacy with the other person.

Proposed changes to the *Police Offences Act 1935* (Tas)

Clause 26 of the Bill amends section 35 of the *Police Offences Act 1935* (Tas), which relates to injuries to the person. The Bill seeks to remove both subsections (3) and (4) from the section of the Act:

> *(3) A person who with indecent intent assaults any other person is liable to a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years.*
>
> *(4) If on a complaint under subsection (3) the court finds the assault proved but not the intent, it may amend the complaint to one under subsection (1) for the same assault and convict accordingly.*

[5] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 44.

The effect of this change would be to remove the offence of indecent assault from the *Police Offences Act 1935* (Tas) entirely, meaning an offender could only be charged with an indictable offence under the *Criminal Code Act 1924* (Tas).[6]

In the absence of any explanatory materials around the proposed changes introduced by the Bill, it is unclear how this proposed change relates to any recommendation made by the Royal Commission. We understand one of the recommendations was to remove limitation periods for sexual offences committed against children;[7] as the proposed change would remove the summary offence, which can only be charged within six months of the alleged date of the offence, this would effectively remove the limitation period for indecent assault as it would mean any potential offender would have to be charged under the relevant offence/s in the *Criminal Code Act 1924* (which has no limitation period for offences to be laid). However, the removal of the summary offence has impacts which extend beyond what was recommended by the Royal Commission – for example, it removes the summary offence for any offender who has committed an alleged indecent assault, whether or not the victim is a child. This has practical implications for how the offence is dealt with, as well as implications for penalty: the maximum penalty for the summary offence of indecent assault under s35 is either a fine of 50 penalty units or imprisonment for 2 years,[8] whereas the maximum penalty for any offence under the *Criminal Code Act 1924* (Tas) is 21 years.[9]

The removal of this offence was also not supported by the Tasmanian Law Reform Institute ('the TLRI') in their report in relation to sexual offences against children in Tasmania.[10] The report does outline some concerns in relation to the summary offence of indecent assault, but these concerns primarily relate to whether or not relevant defences under the *Criminal Code 1924* (Tas) apply to the summary offence.[11] The recommendation from the TLRI was to retain the summary offence of indecent assault but change the wording to make it clear that the relevant defences under the *Criminal Code Act 1924* (Tas) apply.[12]

In the absence of a clear justification for the inclusion of these provisions, as well as how this proposed change relates to recommendations from the Royal Commission, TasCOSS does not support these provisions in the Bill and recommend that the summary offence of indecent assault remain in the *Police Offences Act 1935* (Tas).

[6] For example, an offender could be charged with indecent assault under *Criminal Code Act 1924* (Tas) s127.
[7] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 46 – *Recommendation 30: State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.*
[8] *Police Offences Act 1935* (Tas) s35 (3).
[9] *Criminal Code Act 1924* (Tas) s389.
[10] Tasmanian Law Reform Institute, 'Sexual Offences Against Young People' (October 2012).
[11] Ibid, 35 – '*consent is a defence but not (subject to the age similarity consent defences) when the person assaulted is under the age of 17; and mistake as to age is a defence*.'
[12] Ibid, 66 - *Recommendation 8: That s 35(3) of the Police Offences Act 1935 be amended to read 'a person who unlawfully and indecently assaults another person is guilty of an offence'. This would make it clear that the Code applies to this offence, including provisions relating to defences*.

Recommendation:

- Clauses 25 and 26 of the Bill, relating to proposed changes to the *Police Offences Act 1935* (Tas) should be removed from the Bill.

Proposed changes to the *Justices Act 1959* (Tas)

It is difficult to understand how clauses 20, 21 and 22 relate to recommendations from the Royal Commission.

The purpose of the clauses seems to be to ensure the offence of indecent assault under the *Criminal Code Act 1924* (Tas) can only be tried summarily (in the Magistrates' Court rather than the Supreme Court) with the consent of the prosecution; as it stands currently, an offence of indecent assault can be tried summarily pursuant to s72 (1) (a) of the *Justices Act 1959* (Tas) with the consent of the alleged offender (or their guardian) and the Court.[13] In the absence of supplementary material justifying the inclusion of these provisions and how they support recommendations from the Royal Commission, TasCOSS believes the decision to allow for this offence to be heard summarily should not be further restricted by requiring prosecutorial consent.

Recommendation:

- Clauses 20, 21 and 22 should be removed from the Bill

Provisions relating to the witness intermediary scheme in Tasmania

The Bill contains a number of provisions relating to the witness intermediary scheme in Tasmania. The scheme commenced in 2021[14] and is governed by the *Evidence (Children and Special Witnesses) Act 2001* (Tas). According to a recent Government report,[15] 'Tasmanian witness intermediaries are making a real difference to how courts, legal practitioners and police communicate with children and vulnerable adults and are improving outcomes for vulnerable victim-survivors and witnesses participating in police interviews and criminal trials. Since commencement, witness intermediaries have assisted victims and witnesses engaging with Tasmania Police and participating in criminal trials on over 300 occasions... [with] 21 witness intermediaries servicing all regions of Tasmania.'[16]

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[13] *Justices Act 1959* (Tas) s72 (1) – '*the justices, as specified in section 55 or 58 and in the prescribed form of words or in words of like import, may ask the defendant if he is willing to be tried or sentenced by the justices instead of by jury and, if that person, or, if he is under the age of 17 years, his parent or guardian, does not object to his being tried or sentenced by the justices, the section creating the offence shall be deemed to have created a simple offence and the complaint shall be dealt with accordingly, subject to the provisions of this section*'.

[14] Tasmanian Government, 'Supporting children and vulnerable witnesses in the justice system' (Media Release, 1 March 2021), accessed at https://www.premier.tas.gov.au/site_resources_2015/additional_releases/supporting_children_and_vulnerable_witnesses_in_the_justice_system.

[15] Tasmanian Government, Department of Justice, 'Fourth Annual Progress Report and Action Plan 2022: Implementing the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse' (December 2021).

[16] Ibid, 35.

The Government has indicated that the additional provisions in the Bill are designed to '[e]xtend the classes of vulnerable witnesses who are eligible for their pre-recorded police interviews to be used as their evidence in chief in criminal proceedings.'[17] TasCOSS is supportive of provisions which allow for pre-recorded audio-visual material to be used as examination in chief for certain witnesses, noting this was a recommendation from the Royal Commission,[18] and that similar schemes already exist in other jurisdictions.[19]

We understand the purpose of an intermediary scheme is to support the communication needs of people within the criminal justice system, particularly those who might be otherwise excluded from meaningfully participating in complex and formal processes. As the TLRI noted in a recent report,[20] '[t]he ability of a person who has been the victim of a crime or who has been accused of a crime to communicate effectively with police and legal counsel and to participate in criminal trials will fundamentally determine whether that person can gain access to justice and whether justice can in fact be done'.[21] We understand a key purpose of the scheme is to empower Tasmanians who might otherwise be marginalised within the criminal justice process; in order to achieve this objective, we believe the scheme must operate with the knowledge and consent of those people who may benefit from an intermediary (whether as witnesses, suspects, accused persons or victims). We are therefore concerned about the proposed changes in Clause 18 of the Bill, which seeks to remove a provision which requires the consent of a witness before an intermediary report can be ordered by a judge and inserts provisions which allow for a judge to order a report without the consent of the witness in certain circumstances. TasCOSS is concerned this provision may operate in a way that further marginalises or disadvantages people who are already vulnerable. We also believe these provisions to be potentially inconsistent with what we understand to be the objectives of the intermediary scheme, which are focused on increasing access to justice and empowerment within the criminal justice system. In the absence of further information/documentation justifying the inclusion

[17] Tasmanian Government, Department of Justice, 'Justice Miscellaneous (Royal Commission Amendments) Bill 2022 - Have your say' (20 September 2022), accessed at https://www.justice.tas.gov.au/community-consultation/consultations/Justice-Miscellaneous-Royal-Commission-Amendments-Bill-2022.

[18] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 80:

> Recommendation 52. State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions. This should include both:
>
> a. in summary and indictable matters, the use of a prerecorded investigative interview as some or all of the witness's evidence in chief
>
> b. in matters tried on indictment, the availability of pre-trial hearings to record all of a witness's evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the witness need not participate in the trial itself.
>
> Recommendation 53. Full prerecording should be made available for:
>
> a. all complainants in child sexual abuse prosecutions
>
> b. any other witnesses who are children or vulnerable adults
>
> c. any other prosecution witness that the prosecution considers necessary.

[19] For example, see information on Visual and Audio Recording of Evidence (VARE) in Victoria from the Judicial College of Victoria, Victorian Criminal Proceedings Manual, 'Chapter 13.5.1 VARE Procedure', accessed at https://www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27695.htm.

[20] Tasmanian Law Reform Institute (TLRI), 'Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?' (January 2018).

[21] Ibid, vi.

of these provisions and explaining how they relate to recommendations from the Royal Commission, we recommend this clause is withdrawn from the Bill.

We support the provisions in the Bill which will hopefully extend the use of intermediaries in Tasmania – for example, Clause 19 of the Bill confers broad power on a judge to appoint a witness intermediary in relation to a person in a specified proceeding. However, we are concerned the current provisions in the *Evidence (Children and Special Witnesses) Act 2001* (Tas), as well as the provisions in the Bill, do not allow for intermediaries to be used for an accused person who may have a communication need, either in a courtroom setting or during the investigation stage (for example, during a police interview); in particular, the broad powers granted judges in relation to appointing intermediaries will not apply to defendants (including child defendants), as they are explicitly excluded as a class of witness in s7I of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). We note the TLRI report highlighted the need for a broad scheme in Tasmania, and their report recommended, 'it should be mandatory to engage intermediaries/communication assistances in all cases involving people with communication needs, whether they be victims, suspects, defendants or witnesses'.[22]

The proposed changes to the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) also relate to witness intermediaries. The *Criminal Law (Detention and Interrogation) Act 1995* (Tas) allows for the police to detain a person for a 'reasonable time', with a non-exhaustive list of factors to be considered included in s4 (4).[23] Clause 9 of the Bill includes an additional subsection allowing police to suspend or

[22] Tasmanian Law Reform Institute (TLRI), 'Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?' (January 2018), xiv.

[23] *Criminal Law (Detention and Interrogation) Act 1995* (Tas), s4(4):

> *In determining what constitutes a reasonable time for the purposes of subsection (2) (a), consideration must be taken of, but is not limited to, the following matters:*
>
> *(a) the number and complexity of the offences to be investigated;*
> *(b) any need of the police officer to read and collate relevant material or to take any other steps that are reasonably necessary by way of preparation for the questioning or investigation;*
> *(c) any need to transport the person from the place of apprehension or detention to a place where facilities are available to conduct an interview or investigation;*
> *(d) the number of other people who need to be questioned during the period of custody in respect of the offence for which the person is in custody;*
> *(e) any need to visit the place where the offence is believed to have been committed or any other place reasonably connected with the investigation of the offence;*
> *(f) the time during which questioning is deferred or suspended to allow the person to communicate with a legal practitioner, friend, relative, parent, guardian or independent person or, in the case of a child, a person called by the police officer conducting the investigation to accompany the child;*
> *(g) any time taken by a legal practitioner, friend, relative, parent, guardian, independent person or interpreter or, in the case of a child, a person called by the police officer conducting the investigation to accompany the child to arrive at the place where the questioning or investigation is to take place;*
> *(h) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to receive medical attention;*
> *(i) any time during which the questioning or investigation of the person is suspended or delayed to allow the person to rest or receive refreshment;*
> *(j) the period of time when the person cannot be questioned because of his or her intoxication, illness or other physical condition;*
> *(k) the need to detain the person whilst an identification parade is being arranged or conducted;*
> *(l) the need to detain the person whilst searches or forensic examinations are carried out;*
> *(m) any other matters reasonably connected with the investigation of the offence.*

delay either the investigation or questioning of a person 'to facilitate the use of a witness intermediary'. It is unclear from the wording of the provision whether the intention is to permit the use of a witness intermediary as part of the investigation and/or questioning of the accused (for example, to provide an accused person with access to a witness intermediary for the purposes of their police interview). Whilst TasCOSS is supportive of measures which would increase use of witness intermediaries in the criminal justice system, we are also conscious of the risks associated with extended periods in police custody, particularly for marginalised groups (including children, Aboriginal Tasmanians or people with disability).[24] We recommend the Government consider an additional provision in this section, to include the vulnerability of a detained person as a factor to be considered by police in relation to time spent in police custody. Vulnerability of a detained person should include, but is not limited to, a person's Aboriginality, their age or any physical/mental impairment.

We understand the intermediary scheme will be formally reviewed after three years; in the meantime, we encourage the Government to consider ways the scheme could be broadened in Tasmania – this could include further community education about the scheme, as well as training for people within the criminal justice system (including police, lawyers, workers from relevant community organisations and judicial officers) to increase awareness of the scheme and encourage the use of intermediaries where appropriate.

Recommendations:

- Clause 18 should be withdrawn from the Bill
- Additional provisions should be added to the Bill to ensure intermediaries can be used for suspects and accused persons with communication needs
- An additional clause should be considered for introduction in the Bill in relation to section 4(4) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas) to include as a factor for consideration by police any special vulnerability of the accused, including (but not limited to) their age, Aboriginality or physical/mental disability
- The Government should prioritise measures which encourage greater awareness and use of the intermediary scheme, both within the criminal justice system and the Tasmanian community more broadly

Proposed changes to the *Evidence Act 2001* (Tas)

The Bill proposes significant changes to tendency evidence under the *Evidence Act 2001* (Tas). Tendency evidence has been defined by the TLRI as, 'evidence of the character, reputation or conduct of a person, or a tendency of a person to act in a particular way or to have a particular state of mind… [which] shows that because a person has acted in a certain way on previous occasions, the person is more likely to have acted in a similar way on another occasion'.[25]

[24] See, for example, Kamolins, L and Tait, S, 'Protecting human rights for people in police custody' (Conference Paper, Australasian Human Rights and Policing Conference, 8-10 December 2008), 9-10; Tasmanian Law Reform Institute (TLRI), 'Consolidation of Arrest Laws in Tasmania: Issues Paper' (July 2006), 32-33.
[25] Tasmanian Law Reform Institute (TLRI), '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' (February 2012), 4.

Issues relating to tendency and coincidence evidence were highlighted during the Royal Commission as an issue of particular relevance for victim-survivors and the criminal justice system more broadly:

> How the criminal justice system deals with allegations against an individual of sexual offending against more than one child is one of the most significant issues we have identified in our criminal justice work. Where the only evidence of the abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. There may be evidence that confirms some of the surrounding circumstances, or evidence of first complaint, but the jury is effectively considering the account of one person against the account of another. We have heard of many cases where a single offender has offended against multiple victims. Particularly in institutional contexts, a perpetrator may have access to a number of vulnerable children. In these cases, there may be evidence available from other complainants or witnesses who allege that the accused also sexually abused them. The question is whether that 'other evidence' can be admitted in the trial.[26]

Whether or not tendency evidence can be admitted can impact a trial in various ways. Firstly, allowing tendency evidence in relation to more than one complainant - for example, the victim in the alleged offending, as well as evidence from other complainants about other relevant acts - can result in cross-admissible evidence. Such situations occur where the evidence of one complainant can be used to convict the defendant of an offence against another complainant. Tendency rules are also relevant where a defendant is accused of perpetrating offences against more than one complainant and a decision must be made in relation to whether the court will hear joint or separate trials. Tendency rules also permit, in certain circumstances, evidence about acts relating to other witnesses who are not complainants. This could include victim-survivors of abuse against whom, for whatever reason, criminal charges have not been laid, as well as victim-survivors of prior criminal offences perpetrated against them by the accused for which that person has already been sentenced. It also includes as evidence about the 'character, reputation or conduct' of the accused.[27]

The Royal Commission heard extensive evidence from a wide range of stakeholders, including legal experts, victim-survivors and community organisations, which detailed some of the difficulties created by tendency rules, including but not limited to the following:

- The difficulties experienced by victim-survivors who are required to give evidence at multiple trials;
- The difficulties created for victim-survivors who find themselves subject to individual, rather than joint, trials with other complainants in relation to a particular accused person;
- Concerns that juries in trials relating to child sex offences are not provided contextual information which could be relevant or significant in determining guilt, particularly given the inherent difficulties in prosecuting sexual offences and offences against children.

[26] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 65.
[27] *Evidence Act 2001* (Tas) s97 (1).

- Confusion and potential unfairness arising from different approaches to tendency evidence from different jurisdictions around Australia.

However, several reports (as well as case law) highlight the reasons why there have historically been concerns in relation to tendency evidence, particularly in relation to how the admission of tendency evidence might result in unfair prejudice towards the accused.[28] Although the Royal Commission was ultimately satisfied that their proposed changes to tendency rules would not have a significant impact on procedural fairness, we note several stakeholders raised concerns about the Royal Commission's research and findings in this area.[29] Several reports have also highlighted the need to balance the rights of victim-survivors and accused persons in a criminal trial,[30] as well as the complexities of this area of law.

We understand the proposed changes in the Bill seek to achieve the following purposes:

- Lowering the current threshold for admissibility of tendency evidence
    - The current threshold for tendency evidence is found in *Evidence Act 2001* (Tas) s101 (2): *Tendency evidence about a defendant, or coincidence evidence about a defendant, adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant*
    - Clause 14 of the Bill amends this threshold to 'outweighs the danger of unfair prejudice to the defendant'
- Reversing the onus of proof in relation to the admissibility of tendency evidence
    - Currently, the 'tendency rule' operates to place onus of establishing whether the evidence meets the threshold for admissibility rests with the prosecution
    - Clause 12 of the Bill includes provisions which effectively reverse this onus in relation to proceedings involving child sexual offences, creating a presumption that certain tendency evidence about a defendant will have significant probative value,[31] which can then be rebutted by a court 'if it is satisfied there are sufficient grounds to do so'
- Extending what can be considered tendency evidence
    - the Bill does this in two ways – creating a presumption that certain classes of tendency evidence will be considered to have significant probative value, and also stipulating that

[28] For example, see Tasmanian Law Reform Institute (TLRI), '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' (February 2012), 21-22; Victorian Law Reform Commission (VLRC), 'Sexual Offences: Final Report' (July 2004), 248-254; Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission, 'Uniform Evidence Law' (December 2005), 80-85.

[29] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice: Parts III – VI, 2017), 467-486.

[30] Tasmanian Law Reform Institute (TLRI), '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' (February 2012), 21-22.

[31] Justice Miscellaneous (Royal Commission Amendments) Bill 2022, cl 12 – this clause inserts a new section into the *Evidence Act 2001* (Tas), with the following subsections (s97A (2):

> *(2) It is presumed that the following tendency evidence about the defendant will have significant probative value for the purposes of sections 97(1)(b) and 101(2):*
>
> > *(a) tendency evidence about the sexual interest that the defendant has or had in children (even if the defendant has not acted on the interest);*
> >
> > *(b) tendency evidence about the defendant acting on a sexual interest that the defendant has or had in children.*

certain matters cannot be taken into account in rebutting the presumption that the tendency evidence does not have significant probative value[32]

The changes proposed to tendency evidence in the Bill are significant. They also appear to mirror recently introduced legislation in NSW, rather than the model provisions proposed by the Royal Commission.[33] The changes are also different to those proposed by the TLRI.[34] In the absence of explanatory memoranda, it is difficult to know why this model has been preferred for adoption in Tasmania – given the legislation in NSW has only been in force for a relatively short period of time, it is also difficult to reflect on the impact the legislation has had in that jurisdiction (although case law does demonstrate the changes have resulted in a significant broadening of the scope of what can and will be considered admissible for tendency purposes).[35]

TasCOSS cannot support the provisions in relation to the *Evidence Act 2001* (Tas) without further justification in relation to why the proposed model for tendency rules is preferred, as well as an explanation for how certain provisions will operate (for example, clearer guidelines around what kind of evidence is likely to satisfy the threshold established in the proposed s97A (2) (a) found in Clause 12 of the Bill). We are concerned about the consequences of such a significant change to a complex principle of evidence law, particularly given the very short time allowed for community consultation and the lack of additional explanatory materials provided. We are also conscious of the evidence given by victim-survivors and legal experts in the recent Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse, and strongly support measures which incorporate the experiences, knowledge and opinions shared through that process (noting the Commission is due to provide a final report no later than 1 May 2023). We urge the Government to continue exploring these issues with relevant organisations and stakeholders, particularly in light of any recommendations arising from the

[32] Justice Miscellaneous (Royal Commission Amendments) Bill 2022, cl 12 – this clause includes a proposed new subsection s97A (5):

> *(5) The following matters (whether considered individually or in combination) are not to be taken into account when determining whether there are sufficient grounds for the purposes of subsection (4) unless the court considers there are exceptional circumstances in relation to those matters (whether considered individually or in combination) to warrant taking them into account:*
>
> > *(a) the sexual interest or act to which the tendency evidence relates (the tendency sexual interest or act) is different from the sexual interest or act alleged in the proceeding (the alleged sexual interest or act);*
> > *(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred;*
> > *(c) the personal characteristics of the subject of the tendency sexual interest or act (for example, the subject's age, sex or gender) are different to those of the subject of the alleged sexual interest or act;*
> > *(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act;*
> > *(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act;*
> > *(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features;*
> > *(g) the level of generality of the tendency to which the tendency evidence relates.*

[33] Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Parts VII - X and Appendices, 2017), 592-596.

[34] Tasmanian Law Reform Institute (TLRI), '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' (February 2012), v.

[35] For example, see *R v Brookman* [2021] NSWDC 110 (25 March 2021), 43-72.

Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse, to ensure any legislative change in this area achieves an appropriate balance between the rights and interests of all parties in child sex offence proceedings.

Recommendations:

- Clauses 12, 13 and 14 should be removed from the Bill;
- The Government should engage in robust and extensive consultation in relation to any proposed changes to principles of tendency and coincidence evidence, including any relevant recommendations from the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse

Final comments and conclusion

TasCOSS strongly recommends the Department allow for a greater period of consultation time, as well as detailed explanatory materials, in relation to future submissions of this nature. We appreciate the time restraints may result from a sincere desire on the part of Government to respond to the need for reform outlined in both the Royal Commission and the recent Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse. However, the volume of material required to be read and assessed to thoughtfully consider the proposed amendments in the Bill, as well as the potential significance of the proposed amendments on the criminal justice system, is not commensurate with the time and material provided. Many of the proposed amendments also relate to technical and complex legal principles, which require careful consideration in order to make meaningful change. The proposed changes are also of extreme importance not only to legal practitioners or those working within the criminal justice system, but to those individuals, families and communities who have been impacted by child sexual abuse, as well as the many community and other organisations who work to support victim-survivors. Future consultations of this nature must provide organisations and individuals with sufficient time and resources to meaningfully respond.