



Tasmanian Council of Social Service Inc.

Justice Miscellaneous (Commission of Inquiry) Bill 2024

June 2024



**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 evidence-based, effective solutions to address these issues.

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Introduction

TasCOSS welcomes the opportunity to provide feedback on the Justice Miscellaneous (Commission of Inquiry) Bill 2024 ('the Bill'). The Bill contains amendments relating to several pieces of legislation, including the *Police Offences Act 1935* (Tas), the *Criminal Code 1924* (Tas) and the *Sentencing Act 1997* (Tas). Most of the proposed reforms respond to recommendations from the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('the Commission of Inquiry').

Our submission on the Bill provides an overview of key issues as well as recommendations for amendments and suggestions for supplementary reforms which should be prioritised alongside this reform.

We also take this opportunity to strongly recommend urgent changes to consultation processes for legislative and policy reform relating to the Commission of Inquiry reform implementation project. These reforms are important to all Tasmanians, particularly those who have been personally impacted by institutional child sexual abuse. While we appreciate the Government is trying to advance reforms to comply with the timeframes outlined in the Keeping Children Safe report,¹ they have also recognised the importance of ensuring the reforms are progressed in ways that promote the safety and wellbeing of children, as well as being sensitive to the needs of those with lived experience. The Premier himself has stated, 'our focus is ensuring we get the right outcomes to make our children and young people safe, and we are not prepared to compromise those outcomes in favour of simply ticking boxes'.² TasCOSS strongly supports changes to the consultation process (discussed further below) to ensure community members and organisations can be meaningfully involved.

TasCOSS involvement in the Commission of Inquiry reform implementation project

TasCOSS, alongside other community organisations, is working in partnership with the Keeping Children Safe Reform Unit of the Department of Premier and Cabinet ('DPAC') in relation to the implementation of recommendations from the Commission of Inquiry and related reforms. As part of our collaborative role, we have developed a series of project principles (found in Appendix A) which we will use to guide our responses to proposed policy and legislative reform throughout the implementation process. We believe all reform aimed at promoting and protecting the safety of children should include a focus on four key objectives: preventing child sexual abuse, strengthening community connections for children and families, supporting the community services industry, and increased transparency and accountability in relation to Government decision-making.

¹ Tasmanian Government, 'Keeping Children Safe and Rebuilding Trust - Government Response to the Report of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings' (December 2023).

² Tasmania, Parliamentary Debates, Legislative Assembly, 23 May 2024 (Jeremy Rockliff, Premier of Tasmania).

Key issues

Apologies for institutional child sexual abuse

The Commission of Inquiry made specific recommendations in relation to apologies from institutions in relation to institutional child sexual abuse:

Recommendation 17.4

The Tasmanian Government should ensure individual victim-survivors of child sexual abuse who request an apology receive one. Proactive steps should also be taken to offer an apology to victim-survivors who make contact in relation to their abuse. The apology should include:

- a. the opportunity to meet with a senior institutional representative (preferably the Secretary) and receive an acknowledgment of the abuse and its impact*
- b. information about the victim-survivor's time in the institution*
- c. information about what steps the institution has taken or will take to protect against further sexual abuse of children, if asked.*

Recommendation 17.5

The Tasmanian Government should introduce legislation to amend the Civil Liability Act 2002 to ensure that an apology in relation to child sexual abuse can be made without amounting to an admission of liability.

The Bill proposes amendments to the *Civil Liability Act 2002* to ensure there are no legal disincentives for institutions which make apologies or admit liability for wrongdoing (consistent with Recommendation 17.5). The proposed amendments are found in Clauses 4 and 5 of the Bill.

TasCOSS supports the proposed legislative amendments but strongly recommend the Government consider additional measures to support victim-survivors of child sexual abuse as proposed by the Commission of Inquiry. Whilst removing what may have been perceived as a disincentive for institutions to formally apologise, we don't believe these amendments will necessarily result in proactive steps being taken to offer apologies, or work towards protecting against future harm. We also believe that further policies are needed to ensure consistencies between agencies/institutions in relation to how they will respond to instances of child sexual abuse. TasCOSS urges the development of whole-of-government guidelines for how institutions will respond to child sexual abuse, as enacted in other Australian jurisdictions. For example, the Queensland Government have developed guidelines (applicable across all State Government agencies) to ensure a consistent and compassionate response when engaging with victim survivors of child sexual abuse, which includes the objectives of minimising potential re-traumatisation and easing the burden of formal legal processes.³ We strongly recommend the

³ An overview of the background (and to access the guidelines) can be found on the website of the Department of Justice and Attorney-General of the Queensland Government: <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>.

development of a similar guideline or protocol in Tasmania, which should also include processes reflecting the recommendations made by the Commission of Inquiry in 17.4.

We also note that, whilst the amendments are intended to clarify that an apology from an institution will not constitute a legal admission of liability, the amendments will not remove any rights a victim survivor may have in pursuing a claim against an institution or entity. We note existing schemes for victim survivors to receive compensation or redress for instances of abuse (for example, the National Redress Scheme) rely heavily on community organisations (such as the Sexual Assault Support Service, Laurel House and Relationships Australia Tasmania) to provide ongoing support to claimants. We believe legal amendments intended to support victim survivors who seek apologies for institutional harm should also be accompanied by commitments to increase the funding and capacity of community organisations who are already providing assistance, to ensure all victim survivors are aware of and can access support when needed and to make sure the apology process is trauma-informed and person-centred.

Criminal law amendments

There are several proposed amendments contained within the Bill which relate to existing or potential criminal offences and related regulatory regimes.

TasCOSS supports the change in wording contained in Clause 9 (e) and (f) to remove references referring to ‘sexual relationships’ between adults and children and replacing these with consistent terminology referring instead to sexual abuse or unlawful sexual acts.

We also support Clause 9 (g) which ensures the offence of ‘failure by a person in authority to protect a child from a sexual offence’ does not apply to children.

Clause 9 also introduces a new offence – ‘indecent act with or directed at a child [or young person] by a person in a position of authority’. The introduction of this offence was recommended by the Commission of Inquiry.⁴ Clause 9 (c) and (d) also ensure the new offence is an offence which can be including to establish the offence of ‘persistent sexual abuse of a child’ pursuant to s125A of the *Criminal Code 1924 (Tas)*. Whilst we support the introduction of the offence and its inclusion within s125A, we strongly recommend additional legislative provisions to include a ‘similar age defence’ for this new offence, similar to provisions relating to similar type offences under the *Criminal Code 1924 (Tas)*.⁵

⁴ Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse, Final Report, August 2023, pp59-61.

⁵ For example, consent is a defence to the offence of ‘indecent act with a child or a young person’ under s125B of the Criminal Code 1924 (Tas) in limited circumstances where the person who committed the alleged offence was of a similar age to the child or young person against whom the offence was committed:

(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.

Clause 7 of the Bill amends the *Community Protection (Offender Reporting) Act 2005 (Tas)* to include the new offence of ‘indecent act with or directed at a child [or young person] by a person in a position of authority’ as a Class 2 offence, meaning an expansion of the regulatory reporting framework. This amendment does not relate to any recommendation from the Commission of Inquiry. TasCOSS has previously made submissions raising concerns about the effectiveness and potential unintended consequences of reporting regimes for people convicted of sexual offences,⁶ noting academic papers have highlighted the lack of evidence that such schemes prevent sexual offending, reduce recidivism or promote public safety.⁷ As TasCOSS as noted previously, ‘[g]iven the high cost of registration and monitoring schemes generally, we are not convinced that expanding the existing registration regime and introducing a public notification element is an effective use of money, time and resources – which could be far better spent by investing in primary prevention initiatives to support safe families and communities, as well as early intervention programs to intervene and protect against child sexual abuse’.⁸ We therefore recommend Clauses 6 and 7 are withdrawn from the Bill.

Jury directions

Clauses 136, 136A, 371A, 371B and 371C relate to the introduction of jury directions for criminal trials involving child sexual abuse or family violence offending. The purpose of these amendments is to respond to common harmful misconceptions members of the public may have in relation to victim survivors of abuse or violence – for example, that a delay in reporting abuse may be indicative of that abuse not actually having taken place.

The introduction of jury directions in relation to child sexual abuse matters was recommended by the Commission of Inquiry, and has been raised by law reform bodies as an issue of concern relating to criminal practice.⁹ Similar provisions also exist in other Australian jurisdictions – for example, in Victoria there is a jury direction clarifying there is no typical or normal response to non-consensual sexual activity and that people on a jury shouldn’t be assessing how a victim survivor has responded in determining whether or not that activity took place.¹⁰

⁶ TasCOSS, Submission to Department of Police, Fire and Emergency Management, ‘Community Protection (Offender Reporting) Amendment Act 2023’ (February 2024).

⁷ See, for example, Zgoba, K and Mitchell, M ‘The effectiveness of Sex Offender Registration and Notification: A meta-analysis of 25 years of findings’ (2021) *Journal of Experimental Criminology*, accessed at <https://doi.org/10.1007/s11292-021-09480-z> and Napier, S, Dowling, C, Morgan, A and Talbot, D, ‘Trends and Issues in Crime and Criminal Justice: What impact do public sex offender registries have on community safety?’ (May 2018), accessed at https://www.aic.gov.au/sites/default/files/2020-05/ti_what_impact_do_public_sex_offender_registries_have_on_community_safety_220518_0.pdf.

⁸ TasCOSS, Submission to Department of Police, Fire and Emergency Management, ‘Community Protection (Offender Reporting) Amendment Act 2023’ (February 2024), 5.

⁹ Victorian Law Reform Commission, ‘Improving the Justice System Response to Sexual Offences: Report’ (November 2021), accessed at <https://www.lawreform.vic.gov.au/publication/improving-the-justice-system-response-to-sexual-offences-report/20-juries-and-sexual-offence-trials/>.

¹⁰ *Jury Directions Act s47E Direction on responses to a non-consensual sexual act*

For the purposes of this Division, a direction on responses to a non-consensual sexual act is a direction informing the jury that experience shows that—

- (a) people may react differently to a sexual act to which they did not consent, and there is no typical, proper or normal response; and*
- (b) people who do not consent to a sexual act may not protest or physically resist the act.*

Example

The person may freeze and not do or say anything.

TasCOSS is generally supportive of the introduction of jury directions in child sexual abuse trials but notes the following:

- The relevant clauses of the Bill give limited guidance as to when, by whom and how a jury direction can be requested – while some of the directions are mandatory, others will be at the discretion of a judge or can be requested by the prosecution. Unlike in other jurisdictions however, in instances where judges have discretion, the legislation does not provide any framework for how a decision in relation to a potential direction will be made – for example, whether there should be a particular process in the case of trials where an accused is unrepresented.¹¹ TasCOSS believes it would be in the interests of all parties to a proceeding for there to be greater clarity around when and how a direction can/will be given, and what wording will be used. We recommend the development of guidelines (or potentially further legislative reform) in relation to jury directions to ensure clarity around when and by whom they can be requested.¹²
- As noted in the Explanatory Fact Sheet, the proposed new section s371B found in Clause 9 of the Bill does not relate to any recommendation of the Commission of Inquiry but proposes a reform to introduce jury directions in relation to family violence matters. Given the extremely short timeframe for consultation (to be discussed further below), and the justification that limited consultation is appropriate in this instance as the Government is prioritising legislative reform which responds to Commission of Inquiry recommendations identified as Phase One/priority recommendations in their Government response, we see no reason why these amendments should be included in this Bill. We anticipate victim survivors of family violence, and relevant stakeholders who support victim survivors and have expert and lived experience in these matters, are likely to have informed opinions to share about these provisions. We therefore recommend those subclauses are withdrawn from the Bill to allow for more extensive consultation with victim survivors and support services.
- TasCOSS agrees that outdated and problematic community attitudes relating to child sexual abuse should be addressed to protect and promote the rights of children. Research highlights the ongoing impact of problematic attitudes and behaviours of legal professionals and judicial officers,¹³ which we believe are best addressed by increased opportunities for ongoing, trauma-informed judicial training (ideally developed and delivered by a dedicated entity working with judges, magistrates and legal professionals). As juries are comprised of members of the general public, there is also clearly still a demonstrable need for better education and awareness raising around issues which relate to child sexual abuse – in our view, prioritising opportunities for early intervention (through developing new education initiatives and expanded existing programs) provide the best chance to prevent child sexual abuse and increase opportunities for early and effective interventions. The Commission of Inquiry made several recommendations in relation to

¹¹ See, for example, s13 *Jury Directions Act 2014* (Vic).

¹² Examples can be found in the bench books of judicial colleges from other jurisdictions – for example, the Criminal Trial Bench Book and the Sexual Assault Trials Handbook of the Judicial Commission of NSW at [Home | Judicial Commission of NSW](#).

¹³ For example, see Monica Otlowski, 'A Critical Assessment of Consent to Sexual Intercourse: Is the Law at Odds with Current Realities?' (undated), University of Tasmania, pp4-5, accessed at <https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Preliminary-submissions/PCO45.pdf>.

preventative education initiatives and we recommend these are implemented as a matter of priority, alongside additional funding for these programs to be developed and delivered by community organisations.

Tendency provisions

Expansion of the tendency principles in relation to sexual assault matters, including child sexual abuse, was specifically recommended by the Commission of Inquiry.¹⁴ The proposed new section 430 in the *Criminal Code Act 1924 (Tas)* outlined in Clause 9, as well as changes to the Police Offences Act outlined in clauses 12 and 13, expand existing tendency provisions to mirror provisions which are already available in relation to family violence offences pursuant to s13B of the *Family Violence Act 2004 (Tas)*.

TasCOSS understands these changes were recommended by the Commission of Inquiry. However, we hold concerns about the potential unintended consequences of the application of these provisions. Firstly, given the tendency provisions will operate to allow for the introduction of evidence in relation to previous acts of alleged (discontinued or withdrawn) sexual offending, they are likely to result in increased cross-examination of victim survivors and witnesses, including witnesses or victims who did not want to proceed with criminal proceedings in the first instance. We are concerned this may result in increased re-traumatisation of victim survivors and/or witnesses.

We are also concerned these provisions may operate in a way which allows courts and juries to hear about and consider previous acts which may have occurred when an accused person was a child (and may have been discontinued for reasons relating to their understanding or moral culpability at that time in relation to the conduct).

We understand the basis on which the Commission of Inquiry made this recommendation was to give courts and juries greater and better opportunities to hear about prior instances of concerning conduct and problematic sexual behaviours – but given the provisions will operate to allow the introduction of material (before a jury or a decision-maker) which is highly prejudicial, we are not supportive of the introduction of these provisions without a more detailed consideration of their application and implication.

TasCOSS has previously made submissions highlighting the need for extensive consultation and careful consideration of the potential impact of changes to ways tendency and coincidence can be used in criminal proceedings,¹⁵ noting academic reports highlighting difficulties of balancing the rights of victim-survivors and accused persons in a criminal trial.¹⁶ Before enacting legislative reform, we urge the

¹⁴ **Recommendation 16.13**

The Tasmanian Government should introduce legislation to extend the principles of section 13B of the Family Violence Act 2004 to sexual assault matters, including child sexual abuse. This will ensure that where a person is acquitted in the Magistrates Court because the prosecution has informed the Court it will not be offering any evidence in support of the charge, the acquittal does not prevent admitting evidence of relationship, tendency or coincidence evidence in a later related matter.

¹⁵ TasCOSS, Submission to Department of Justice, 'Justice Miscellaneous (Royal Commission Amendments) Bill' (October 2022).

¹⁶ 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), pp21-22.

Government to seek the views of organisations and experts who provide legal advice and representation to groups who (according to the Commission of Inquiry's own report) experience ongoing marginalisation and disadvantage within the criminal legal system – including Aboriginal adults and children, Tasmanians with disability and people with lived experience of out-of-home care. We would also strongly recommend a review of the operation of s13 of the *Family Violence Act 2004 (Tas)*, including consultation with victim survivors and workers from legal and support services. If these provisions are to be introduced, we strongly recommend the inclusion of provisions to prohibit the use of tendency evidence which relates to acts which were committed and/or investigated at a time when the accused person was still a child.

Changes to evidence provisions

As outlined above, TasCOSS supports legislative and policy changes to support greater understanding of child sexual abuse (including its prevalence and impacts), which includes changes aimed at addressing problematic attitudes of legal professionals and decision-makers. We believe the best way to address these attitudes and behaviours is by providing greater opportunities for legal and judicial professional training, as recommended by the Commission of Inquiry.¹⁷ TasCOSS recommends the prioritisation of reforms relating to these recommendations. In relation to the legislative reforms proposed in the Bill, we support the changes proposed to the *Sentencing Act 1997 (Tas)* outlined in Clause 24-25 of the Bill, as well as the changes proposed to the *Evidence (Children and Special Witnesses) Act 2001 (Tas)* outlined in the email of the Department of Justice dated 28 May 2024.

General comments on consultation relating to the Commission of Inquiry

Whilst we appreciate the intent behind the short consultation period on the Bill is to advance the implementation of recommendations from the Commission of Inquiry as quickly as possible, the timeframe provided for a response on the Bill – which proposes extensive and significant reform across several complex areas of legal practice and procedure – is simply unacceptable.

The Commission of Inquiry implementation project will involve extensive and ongoing legislative reform across several years. If this consultation is to be meaningful, the Government must allow more time and opportunities for community members and organisations to respond – considering the current pressing demands placed on community organisations to meet growing demand for services, the limited policy and advocacy resources available, and the complexity (and sensitivity) of the issues involved.

As part of our current role in the implementation project, we have been asked to consider how the Government can improve its engagement with non-government organisations (including the community services industry and the community more broadly) on child sexual abuse reform. Community organisations have repeatedly told us that Government must recognise the burden of participating in consultations, and provide greater support for community members and organisations to be meaningfully involved. This includes allowing sufficient time to provide feedback on drafts (we recommend a minimum of **4-6 weeks**), as well as providing multiple engagement options.¹⁸ We reiterate these recommendations.

¹⁷ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse, Final Report, August 2023 pp91-92.

Recommendations

1. The Government should develop a whole-of-government guidelines for how institutions will respond to child sexual abuse.
2. The Government should increase the funding and capacity of community organisations providing assistance to victim survivors who are seeking redress for institutional harm.
3. A 'similar age defence' should be available for the new offence introduced in clause 9 of the Bill.
4. Clauses 6 and 7 should be withdrawn from the Bill.
5. Further legislative or policy reform should be enacted/developed to provide clarity and guidance around jury directions.
6. The new s371B found in Clause 9 of the Bill should be withdrawn to allow for further consultation with victim survivors of family violence and support services.
7. The Government should engage in further consultation with victim survivors, legal professionals and specialist community organisations before enacting any legislative provisions expanding what kind of evidence can be brought before a court to be used as 'tendency' or 'coincidence' evidence – this should include a review of the operation of s13B of the *Family Violence Act 2004* (Tas).
8. Changes to rules around tendency or coincidence evidence should not allow for a court to hear about matters which occurred when the accused person was still a child.
9. All Government consultations relating to the implementation of Commission of Inquiry recommendations should allow at least 4-6 weeks for feedback and allow for multiple types of engagement.

Appendix

TasCOSS Project Objectives

Overview

The following is a summary of the principles which will shape TasCOSS' work as a 'change champion' in the reform implementation project, as well as a list of objectives we are seeking to achieve.

The following has been developed through review of existing research and literature on child safety and wellbeing, including the Final Report of the Commission of Inquiry and the Government's response to the final report, 'Keeping Children Safe'. It has also been developed considering TasCOSS' values (integrity, compassion, influence), the potential impact of reform on Tasmanians experiencing hardship and/or disadvantage, and the needs, views and experiences of community organisations.

Overarching principles

TasCOSS' work in this project will be informed by four key principles.

Keeping children safe requires a focus on the prevention of harm:

- The harm and abuse of children is a preventable public health issue.
- We must invest in protecting children, families and communities from abuse, rather than responding to acts of harm.
- Reform must acknowledge and address the many (and often intersecting) forms of harm which may be experienced by children and young people.
- All Tasmanians should be supported to learn how to better protect and support the safety and wellbeing of children – this includes more comprehensive prevention education for children and also the broader community.
- Children should be empowered to feel strong and safe.
- Children's rights should be upheld, protected and promoted by communities, organisations and institutions.
- There are communities who face elevated or additional safety risks - leaders and organisations who already know and work alongside these communities are best placed to design and lead early intervention and prevention initiatives.

Keeping children safe requires strong, well-connected communities:

- Promoting and maintaining the safety and wellbeing of children requires a whole of community response.
- Children and families are safest when they can access a range of support in the community.
- Strategies and reforms should focus on how we can better support families and groups to provide community-based care for children and young people.
- Strategies and reforms must include consideration of how to reduce the institutionalisation of families or children where possible (for example, within the justice system or out of home care).
- Tasmanian Aboriginal children, young people and families are best supported by strong, empowered Aboriginal communities.

- Initiatives which promote the safety and rights of all Tasmanians, and actively encourage diverse and inclusive organisations and communities, will also promote the safety and wellbeing of children.

Keeping children safe requires well-supported community organisations:

- The community services industry already plays a vital role in promoting and protecting the safety and wellbeing of children. Workers and organisations within this industry should be supported to continue and expand their work.
- Strong networks require a well-resourced and well-supported community services industry to provide a wide range of accessible and effective support.
- Reforms should draw on the expertise and experience of workers within the industry.
- Organisations working to support children and families who experienced elevated risk of harm (such as those working with Aboriginal families, LGBTQIA+ families or families living with disability) must be supported to continue their specialist work and advocacy, and the entire industry should be supported to draw on their expertise to ensure policies and practices are not resulting in further marginalisation.

Keeping children safe requires transparent and accountable institutions:

- Tasmanians must have trust in the institutions that are intended to protect and assist the most vulnerable.
- Government agencies and institutions should work together to respond to issues relating to child safety and wellbeing, in ways that are transparent and consistent with best practice.
- Tasmanians must be given more information about how institutions operate and how institutional decision-making takes place, as well as greater opportunities to meaningfully participate in decision making in areas that impact them.
- Reform must be consistent with national strategies, recommendations and priorities, including the National Strategy to Prevent and Respond to Child Sexual Abuse ('the National Strategy') and best practice from other jurisdictions.
- Reforms must be subject to rigorous independent evaluation processes that involve the public and whose outcomes are publicly available.