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Re: Justice Miscellaneous (Royal Commission Amendments) Bill 2022

The Tasmanian Aboriginal Legal Service (“TALS”) welcomes the opportunity to provide feedback in relation to the Justice Miscellaneous (Royal Commission Amendments) Bill 2022 (“the Bill”).

TALS is a community legal centre that specialises in criminal, civil and family law matters for Aboriginal people in Tasmania. TALS goal is to halve Aboriginal Tasmanians’ rate of negative contact with the justice system in a decade.

TALS is committed to closing the gap and improving life outcomes of Aboriginal people. TALS is an Aboriginal Community Controlled Organisation incorporated under the Office of the Registrar of Aboriginal Corporations.

Background

The Bill seeks to amend several pieces of legislation, implementing changes relating to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Royal Commission”).

TALS notes the overwhelming evidence of child sexual abuse in Aboriginal families and communities, both across Australia and in Tasmania. The extent, and impact of harm caused, has been thoroughly substantiated through extensive investigation and documented in a number of inquiries and reports. Such reports have examined institutional sexual abuse of Aboriginal and Torres Strait Islander children, the failure of institutions and governments to effectively respond to this harm, and the ongoing impacts of this abuse in Aboriginal communities.¹ The Royal Commission noted that 14.3% of victim survivors of child sexual abuse who shared their story

¹ For example, Human Rights and Equal Opportunity Commission, ‘Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families’ (1997).

were Aboriginal and Torres Strait Islanders; the findings of the Royal Commission also highlighted the particular challenges faced by Aboriginal and Torres Strait Islander victim survivors. Many Aboriginal and Torres Strait Islanders victim survivors have experienced physical, emotional and/or sexual violence in out-of-home care or in residential institutions; over one in 5 survivors who attended private evidence sessions, relating to abuse in out-of-home care identified as Aboriginal or Torres Strait Islander.² The Royal Commission also highlighted the need for critical reform to prioritise the protection of Aboriginal and Torres Strait Islander children, who ‘experience increased vulnerability due to a range of historical and contemporary factors... [including] the impacts of past policies and practices as well as ongoing systemic racism, which reduce the protective factors in these children’s lives and place them more often than other children in high-risk institutions’.³

Our submission will not respond to all proposed amendments within the Bill, but instead focus on those which are of relevance, and importance to Tasmanian Aboriginal children and families.

Amendments to the Classification (Publications, Films and Computer Games) Enforcement Act 1995

Clauses 2 – 5 of the Bill relate to child-safety offences under the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); removing limitation periods in relation to some offences,⁴ and extending the limitation period for others.⁵ Clause 5 also introduces a new subsection which allows for retrospective application of changes to the limitation period.

TALS supports the proposed changes, noting the consistency with recommendations made in the Royal Commission.⁶ In making their recommendations for the removal of limitation periods, the Royal Commission noted:

*Generally, limitation periods have reflected the law’s concern to achieve finality and, in criminal law, to avoid unfairness to the accused. However, given what we know about the time many victims and survivors will take to report child sexual abuse, limitation periods clearly have the potential to cause real injustice in protecting an alleged perpetrator from being charged.*⁷

² Ibid, 13.

³ Ibid, 39.

⁴ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s72A: Offence to make or reproduce child exploitation material and s73: Offence to procure child to be involved in making child exploitation

⁵ *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas), s72: Offence to make or reproduce bestiality product; s73A: Offence to distribute child exploitation material; s74: Offence to possess bestiality product; and s74A: Possession of child exploitation material.

Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Parts III–VI, 2017), 129 –

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.

⁷ Ibid, 121.

Amendments to the Criminal Code

- Introduction of a new offence – failure by a person in authority to protect a child from a sexual offence

Clause 7 seeks to amend Schedule 1 of the Criminal Code Act 1924 by introducing both a new offence, and a provision relating to consent between a child and a person in a position of authority.

With regard to the aforementioned offence, the provisions of the Bill provide clarity on who is to be considered a person ‘associated with an organisation’, what type of organisation can be considered a ‘relevant organization’, and what is a ‘sexual offence’. The provisions also confirm that proof a sexual offence has been committed is not required in regards to prosecution under subclause (1).

TALS is broadly supportive of the introduction of offences addressing harms caused to children in institutions. It is imperative to note Aboriginal children in Tasmania, and Australia-wide continue to be overrepresented in high-risk institutional environments, such as residential care facilities and detention centres. The ongoing impact of child sexual abuse and related trauma has been further substantiated by the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings.⁸ However, TALS does wish to note that the introduction of offences alone is unlikely to create meaningful change within institutions, systemic change must be made to protect and safeguard children from potential harm.

TALS holds concerns relating to the operation of ‘failure to protect’ offences and their impact on Aboriginal families and communities have been echoed in other jurisdictions.⁹

Whilst TALS support the focus on institutional, organizational and systemic failures to protect children, we urge the Government to clarify the legislation. Such clarifications are essential to ensuring kinship or foster carers are not captured by these provisions, this recommendation has been outlined in the Royal Commission.¹⁰ TALS urges the Government to prioritise reforms that create greater cultural safety within institutions for Aboriginal families and their children. By directing focus towards capacity-building for organisations, at-risk institutions are able to respond more effectively, and appropriately to situations of potential harm.

- Presumption of lack of consent

The Bill also reverses the presumption of consent between young people and a person in a position of authority. TALS supports the recommendation made by TasCOSS that this offence should only be applicable to adults in positions of authority.¹¹

- Interlocutory appeals

⁸ For example, see Anne Hollands, National Children’s Commissioner, Australian Human Rights Commission, Statement to the Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, 16-17.

⁹ Kylie Cripps, ‘Who’s failing who? New failure to protect laws in Victoria and their impact on Aboriginal mothers and their children’ (2014), 8(3) Indigenous Law Bulletin, 15.

¹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I - II, 2017), 44

¹¹ TasCOSS, Submission in relation to the Justice Miscellaneous (Royal Commission Amendments) Bill (October 2022), 4-5.

TALS wishes to draw attention to the issue of interlocutory appeals, particularly their impact on child sex offence trials. This concern was also considered by the Royal Commission, who noted:

Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial. Interlocutory decisions may significantly reduce, and in some cases even destroy, the prosecution's prospects of success in the prosecution. We consider that the prosecution's interlocutory appeal rights should not be subject to a requirement for leave.

Whilst we note the provisions in the Bill seem largely consistent with recommendations from the Royal Commission.¹² The absence of explanatory materials justifying the introduction of these provisions into the *Criminal Code Act 1924* (Tas), has resulted in much speculation of how beneficial these provisions are within a Tasmanian context. There is also much concern about the potential impact of these provisions on delays, whilst there is not currently a backlog of matters before the Tasmanian Court of Appeal, there are currently significant delays relating to trials in the first instance (where these provisions are likely to be applied).

- **Amendments to the *Criminal Law (Detention and Interrogation) Act 1995* (Tas)**

Clauses 8 and 9 of the Bill relate to the *Criminal Law (Detention and Interrogation) Act 1995* (Tas), legislation relating to the detention of persons suspected of committing offences in police custody. This Act provides a list of factors which must be considered by police when determining whether a person, held in police custody for the purpose of investigation or question, has been held for a 'reasonable' time.

The Bill additionally introduces, that 'any time during which the questioning or investigation of the person is suspended or delayed to facilitate the use of a witness intermediary' be a factor considered when navigating 'reasonable' time.

TALS is in favour of the witness intermediary scheme, proposing the expanded uptake of the scheme throughout the criminal justice system in Tasmania. However, we urge extreme caution towards legislative changes which hold the potential to increase time spent in police custody. The vulnerability of Aboriginal people in police custody and detention is well-documented, explored extensively in the Royal Commission into Aboriginal Deaths in Custody, and highlighted recently in a number of high-profile coronial inquests; including the inquest into the death of Ms Tanya Day.¹³ Increasing the amount of time Aboriginal and Torres Strait

¹² Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Executive Summary and Parts I – II, 2017):

Recommendation 79: State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:

- a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case*
- b. is not subject to a requirement for leave*
- c. extends to 'no case' rulings at trial.*

Recommendation 80: State and territory governments should work with their appellate court and the Director of Public Prosecutions to ensure that the court is sufficiently well resourced to hear and determine interlocutory appeals in prosecutions involving child sexual abuse offences in a timely manner

¹³ Coroners' Court of Victoria, COR 2017 6424, 'Finding into a death with inquest: Ms Tanya Day' (9 April 2020).

Islander Peoples spend in police custody, would directly contradict the Tasmanian Governments commitment to the National Agreement on Closing the Gap.

Amendments to the Evidence Act 2001 (Tas)

Clauses 10-14 of the Bill propose significant changes to the current ‘tendency’ evidence rules in proceedings concerning child sex offences. Tendency evidence encompasses all which relates to the ‘character, reputation or conduct of a person’,¹⁴ or of a tendency they have or had to ‘act in a particular way, or to have a particular state of mind’.¹⁵ rather than relating to either a fact or issue in a particular case or an element of an offence.

Tendency evidence has long been regarded as a complex part of the criminal law. Questions surrounding such complexities and tensions were explored by the Royal Commission, who noted:

If a jury accepts that the accused committed the other offence or offences, the law has accepted that the evidence may be capable of proving the accused has some tendency or propensity to act in a particular way – for example, to be sexually attracted to young boys and to act on that attraction. The jury may then reason that this makes it more likely that the accused acted on this tendency or propensity and committed the particular offence of abusing a young boy whose complaint is the subject of the trial. In trials for child sexual abuse offences, the main issue is usually whether or not the abuse occurred. Typically, the complainant can identify the alleged perpetrator. This is often the case in institutional contexts, where there has been a lengthy relationship between the complainant and the accused – for example, pupil and teacher or parishioner and priest. This can be contrasted with a typical burglary case, where there is no doubt that the offence has occurred but the question is whether the accused was the person who committed the offence. It may also be contrasted with adult sexual assault charges, where the issue of consent, and the accused’s knowledge of lack of consent, are often in issue.¹⁶

The impact of tendency evidence provisions in criminal proceedings were well-documented in the Royal Commission. Various stakeholders raised concerns about the impact of the provisions on victim-survivors, raising concerns such as the kind of evidence which can be given by victim-survivors, and whether or not complainants can participate in a joint trial together with other victim-survivors, rather than facing a trial alone.

The aforementioned provisions, propose changes to the *Evidence Act 2001* (Tas). The changes are consistent with recent legislative changes made in NSW,¹⁷ all of which are based on the model provisions provided alongside the Royal Commission.¹⁸ The changes will not only lower the threshold of admissibility for tendency evidence, but reverse the onus of proof, meaning

¹⁴ *Evidence Act 2001* (Tas), s97 (1).

¹⁵ *Evidence Act 2001* (Tas), s97 (1).

¹⁶ Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report: Parts III–VI, 2017), 414-415.

¹⁷ Evidence Amendment (Tendency and Coincidence) Bill 2020 (NSW)

¹⁸ Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019 (Cth), accessed at <https://pcc.gov.au/uniform/2019/29%20November%202019%20amendments.pdf>.

that unless an accused is able to justify why the evidence should be excluded, particular types of evidence will be considered admissible.

The Bill also increases what can be considered by a court/jury as tendency evidence:

(1) *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.*

TALS is particularly concerned potential changes to what can be considered admissible in terms of ‘character’ evidence. We are unsure how the provisions in the proposed subsection s97A(2)(a) would operate in practice, particularly how the courts and juries will interpret a provision allowing for evidence of a ‘sexual interest’ without evidence of any ‘act’.

The Tasmanian Law Reform Institute (TLRI) engaged in research and made a number of recommendations relating to the issue of tendency. A number of the recommendations made by the TLRI would help ease concerns raised by stakeholders in the Royal Commission. For example, many stakeholders spoke about the significant impact of tendency rules in relation to joint trials, particularly the impact this has on victim-survivors of abuse. The TLRI recommended amendments to the Criminal Code to create a rebuttable presumption in favour of joint trials,¹⁹ noting that ‘it is desirable to provide a complete picture to the jury...[and] important to reduce the trauma caused to complainants by having to give evidence on multiple occasions’.²⁰ It is unclear, in the absence of explanatory materials, why the current Bill has been preferred instead of the recommendations from the TLRI.

We also note expert concerns towards the model provisions proposed by the Royal Commission, during the Royal Commission hearings and in submissions,²¹ and following the Royal Commissions findings.²²

Given the complexities in this area of law, as well as the limited time frame provided by the Department in relation to the current consultation on the Bill, TALS does not support the current provisions in the Bill in relation to changes to the *Evidence Act 2001* (Tas).

Amendments to the Evidence (Children and Special Witnesses) Act 2001

TALS is supportive of introducing provisions which allow for use of pre-recorded audio visual ‘statements’ to be used as evidence in chief in relation to certain witnesses, including children.

¹⁹ 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), 52-57.

²⁰ Ibid, 56.

²¹ Responses are detailed at Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice: Parts III – VI, 2017), 467-486

²² See, for example, Peter Robinson, ‘Joint trials and prejudice: A review and critique of the report to the Royal Commission into Institutional Sex Abuse’ (2017) 43(3) Monash University Law Review 723.

We agree with TasCOSS' recommendations relating to the witness intermediary scheme in Tasmania,²³ particularly in relation to a need for the scheme to be expanded to include the communication needs of an accused person.

Amendments to the Justices Act 1959 (Tas) and Police Offences Act 1959 (Tas)

The clauses in the Bill regarding both the *Justices Act 1959 (Tas)* and *Police Offences Act 1959 (Tas)* concern the current summary offence of indecent assault. Clause 26 of the Bill removes indecent assault as an offence under the *Police Offences Act 1935 (Tas)*, and clauses 20-22 in effect ensures the offence of indecent assault under the *Criminal Code Act 1924 (Tas)* could only be tried summarily with the consent of the prosecution, rather than the consent of the Court.

TALS is concerned about the potential impact of these provisions. Despite the removal of limitation periods coming as a recommendation from the Royal Commission,²⁴ removing the summary offence of indecent assault will mean all offenders (regardless of the circumstances of the offending) will be subject to an indictable charge with far more serious penalties. To remove the summary offence entirely will have an impact all offenders, not only defendants who have been accused of committing offences against children. In our experience, it is rare that an offender who has committed an indecent assault against a child would be charged with this offence, mainly as there are already relevant offences in the *Criminal Code Act 1924 (Tas)*²⁵. TALS are also extremely concerned about the potential delays as a result of these changes – in our experience, whilst Magistrates Court hearings can be listed within a few months, there is currently a significant delay for trials in the Supreme Court. This may create substantial, unintended, and negative consequences for victim-survivors.

Concluding Comments

TALS is firmly of the view that the reforms suggested in Justice Miscellaneous (Royal Commission Amendments) Bill 2022 be re-evaluated to consider the needs of peoples who are already at the highest risk of experiencing harm within the justice system.

Aboriginal and Torres Strait Islander children are continually experiencing trauma and harm at the hands of the failed institutions, such harm has been substantiated and recorded by countless reports, including the royal commission. It is imperative that the needs of the Aboriginal and Torres Strait Islander peoples are considered when moving towards such legislative reform.

TALS is broadly supportive of the introduction of offences addressing harms caused to children in institutions, as well as the removal of limitations periods, but calls for further examination

²³ TasCOSS, Submission in relation to the Justice Miscellaneous (Royal Commission Amendments) Bill (October 2022), 7-10.

²⁴ 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.

²⁵ For example, *Criminal Code Act 1924 (Tas)* s125B: Indecent act with child or young person.

of matters such as the proposed changes to the *Evidence Act 2001 (Tas)*, the *Justices Act 1959 (Tas)* and the *Police Offences Act 1959 (Tas)*. Such reforms need to be made with close consideration for victim-survivors, in both adult and juvenile justice systems.

The recommendations made within the Royal Commission, alongside expert proposals from The Tasmanian Law Reform Institute, should be discussed and implemented in a manner which is not only relevant to Tasmania contextually, but ensures no further harm is caused to victim-survivors.

Thank you for the opportunity to comment on this Bill. Please do not hesitate to be in contact if any points require clarification or elaboration.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'HPP', written in a cursive style.

Hannah Phillips
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Tasmanian Aboriginal Legal Service
