Your Ref:
Our Ref: 956

7 June 2024

Secretary
Department of Justice
GPO Box 825
HOBART TAS 7001

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

Dear Secretary

RE: JUSTICE MISCELLANEOUS (COMMISSION OF INQUIRY) BILL 2024 – CONSULTATION DRAFT

Thank you for the opportunity to make a submission on the draft Justice Miscellaneous (Commission of Inquiry) Bill 2024 (draft Bill). I also acknowledge and express my thanks for the opportunity to speak with members of your Strategic Legislation and Policy Team on 4 June 2024. I note that the draft Bill seeks to implement several short- and mid-term recommendations of the *Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings* (the CoI), which the Government has committed to complete by 1 July 2024 and 1 July 2026 respectively.

I am supportive of the range of recommendations contained within the CoI's Final Report and have communicated publicly my belief that the full and considered implementation of those recommendations and related reforms will arguably lead to a nation leading approach to upholding the rights and wellbeing of our children and young people. However, the rushed timetable set by Government to implement several complex and interrelated CoI recommendations is compromising the rights of children and young people, including their right to participate in and influence decision making processes that essentially affect their lives. The draft Bill serves as a good example of this unfortunate lack of deliberative engagement, with only one week initially provided for community consultation. While I am grateful that the timeframe has been extended by a week, it remains very tight, and entirely insufficient to enable me to meaningfully engage with children and young people to inform my view on the draft Bill. I will return to this issue later in this submission.

+61 (03) 6166 1366
childcomm@childcomm.tas.gov.au
www.childcomm.tas.gov.au
Level 1, 119 Macquarie Street, Hobart, Tas., 7000
GPO Box 708, Hobart, Tas., 7001

I will nevertheless use this opportunity to draw to your attention aspects of the draft Bill that directly engage various child-rights principles and which I believe warrant further discussion and consideration. The parts of the draft Bill that I examined are those that primarily seek to implement Recommendation 16.9b of the CoI's Final Report. My comments are not intended to be exhaustive, and I reserve the right to provide additional feedback, should the opportunity arise.

Role of the Commissioner for Children and Young People

My perspective is governed by a child-rights framework and the United Nations Convention on the Rights of the Child (UNCRC). The *Commissioner for Children and Young People Act 2016* (CCYP Act), which establishes this office, provides that my general functions include:

(a) advocating for all children and young people in the State generally;

(c) researching, investigating and influencing policy development into matters relating to children and young people generally;

(d) promoting, monitoring and reviewing the wellbeing of children and young people generally;

(e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and

(f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.[1]

In performing these and other functions under the CCYP Act, the Commissioner is required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount, and
- observe any relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).[2]

[1] Section 8(1) of the *Commissioner for Children and Young People Act 2016* (Tas).
[2] Section 3(1) of the Commissioner for Children and Young People Act 2016 (Tas).

CoI Recommendation 16.9

Recommendation 16.9 of the CoI's Final Report is as follows:

> **Recommendation 16.9**
>
> The Tasmanian Government should introduce legislation to amend the following provisions in the *Criminal Code Act 1924*:
>
> a. section 125A to remove all language referring to '*maintaining a sexual relationship with a young person*' and replace it with words referring to the '*persistent sexual abuse of a child or young person*'
>
> b. section 124A (the position of authority offence) to cover indecent acts with or directed at a child or young person under the age of 18 by a person in a position of authority in relation to that child or young person. The offence should:
>
> i. not apply where the person accused of the offending is under the age of 18 at the time of the offence
>
> ii. qualify as an unlawful sexual act for the purposes of the offence of '*persistent sexual abuse of a child or young person*' under section 125A of the *Criminal Code Act 1924*
>
> c. section 125E (the offence of failure by a person in authority to protect a child from a sexual offence) to ensure the offence does not apply to a person who was under the age of 18 at the time of the offence.[3]

Applicable articles of the UNCRC

As noted above, in performing my functions, I am required by s.3 of the CCYP Act to do so according to the principle that the wellbeing and best interests of children and young people are paramount and to observe any relevant provisions of the UNCRC.

The amendments to the *Criminal Code Act 1924* (the Code) proposed by the draft Bill require a balancing between, on the one hand, protecting children and young people from risk of harm and, on the other, promoting their healthy development, including by nurturing their evolving capacity to make considered, independent decisions about their own lives.

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[3] Commission of Inquiry, *Who was looking after me? Prioritising the safety of Tasmanian children*, August 2023, Vol 1 Recommendations, p. 156 and Vol 7, Ch 16, pp 59-62 (IRL: https://www.commissionofinquiry.tas.gov.au/___data/assets/file/0011/724439/COI_Full-Report.pdf)

For example, Articles 19 and 34 of the UNCRC provide as follows:

> **Article 19**
>
> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> (…)
>
> **Article 34**
>
> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. (…)

Equally, a range of other UNCRC principles seek to promote the agency, participation and evolving autonomy of children, as well as the right to development of the child. Articles 6, 8, 12, 15 and 16 state respectively:

> **Article 6**
>
> 1. States Parties recognize that every child has the inherent right to life.
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.
>
> **Article 8**
>
> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. (…)
>
> **Article 12**
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (…)
>
> **Article 15**
>
> 1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly. (…)

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

The challenge for lawmakers is to honour these principles and make decisions within the overarching rights framework that requires that the wellbeing and best interests of children and young people are held paramount.[4]

Comment

The purpose of the proposed amendments to the *Code* can be found in the CoI Final Report recommendations and associated passages that investigate position of authority offences:

> *"Child sexual abuse offences generally apply to sexual contact with children who are under the age at which they can consent to sexual contact with an adult. One of the purposes of a position of authority offence is to capture circumstances where the child is above the age of consent (17 in Tasmania) and the alleged offender is in a position of authority over them. Position of authority offences aim to cover a gap in existing laws, criminalising sexual conduct between a child over the age of consent and a person in a position of authority or care."* [5]

I acknowledge the Bill as drafted would make unlawful, sexual activity with or directed at a child (i.e. those aged less than 18) by an adult in a position of authority in relation to that child. I support this as a general proposition and note it is consistent with the protective principles contained in the United Nations Convention of the Rights of the Child. However, I am also concerned that the Bill, as currently drafted, may criminalise in certain circumstances what are generally accepted as normal, healthy, consensual sexual relationships between adolescents or teenagers.

As described by the United Nations Committee on the Rights of the Child:

> *Adolescents are on a rapid curve of development. The significance of the developmental changes during adolescence has not yet been as widely*

[4] Section 3(1), CCYP Act.
[5] Commission of Inquiry, op. cit., Vol 7, Ch 16, p. 59 (IRL: https://www.commissionofinquiry.tas.gov.au/___data/assets/file/0011/724439/COI_Full-Report.pdf)

understood as that which occurs in early years. Adolescence is a unique defining stage of human development characterized by rapid brain development and physical growth, enhanced cognitive ability, the onset of puberty and sexual awareness and newly emerging abilities, strengths and skills. Adolescents experience greater expectations surrounding their role in society and more significant peer relationships as they transition from a situation of dependency to one of greater autonomy. (...)

In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.[6]

The draft Bill, as I understand it, would make unlawful currently lawful sexual activity between for example a 17-year-old and an 18-year-old, where the older teenager is in a 'position of authority' relative to the younger one. In many ordinary circumstances, the proposed reform has the potential to restrict the rights of adolescents and is inconsistent with the view of the United Nations Committee on the Rights of the Child which includes that:

States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.[7]

While I support the general intent of the Bill, I think it is critical that Tasmanian law does not criminalise adolescents behaving normally and non-exploitatively in a range of ordinary circumstances. In this context, and without the benefit of being directly informed by young people due to the timeframes set by the Government, I appeal to the Government to give further consideration to certain elements of the Bill, namely:

1. Definition of 'a person in a position of authority'
2. Similar age defence
3. Translating concepts from the *Civil Liability Act* across to the *Criminal Code*.

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[6] Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence,* CRC/C/GC/20*, 2016, pp.4-6 [URL: https://documents.un.org/doc/undoc/gen/g16/404/44/pdf/g1640444.pdf?token=WqdoHCkNF8pmkH9sSv&fe=true]

[7] Ibid., p. 11.

1. Consideration as to whether the defined categories of person in a position of authority are too wide

There are ten categories that s.124A(1) of the *Criminal Code* defines as being occupied by persons in *positions of authority* for the purposes of the offences in that provision. Recommendation 16.9 does not propose a change to these categories. The Recommendation (and the proposed amendment in the draft Bill) extend the *position of authority* offence from dealing only with *penetrative sexual abuse* to include *indecent acts.* The issue is therefore whether any of these categories is so broadly drafted as to capture consensual and non-exploitative peer-to-peer relationships between young people. This issue was considered by the Royal Commission into Institutional Responses to Child Sexual Abuse.[8] As noted in the Department of Justice Explanatory Fact Sheet accompanying the draft Bill, the wording of Recommendation 16.9 does not indicate whether the CoI gave consideration to the concern flagged by the Royal Commission.[9] This is despite the fact that some of the categories may be seen to lead to some readily apparent unintended consequences. It is curious (and perhaps a function of haste) that the Government would not turn its mind to the readily apparent unintended consequences and re-visit the drafting of the categories at this time given the broader scope of the draft Bill. Similarly, as the Royal Commission suggested and as discussed further below, a similar-age defence, with appropriate safeguards could be introduced to ameliorate the adverse consequences it may have on adolescents.

Excluding Queensland, each of the Australian states and territories adopts a similar definition to capture what the draft Bill defines as *a person in a position of authority*. While the categories included in s.124A(1) are entirely generally appropriate to protect children from abuse in institutional settings, two of the categories in the existing definition in s.124A(1) of the *Code* have the potential to lead to unintended and possibly harmful consequences for young people and those in early adulthood. They are sub-sections 124A(1)(c) and (j) as follows:

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[8] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017, Recommendation 29, p. 120 [URL: https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf]

[9] Department of Justice, *Explanatory Fact Sheet for the Justice Miscellaneous (Commission of Inquiry) Bill 2024 – Consultation Draft*, 2024, p 5 (URL: https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/760069/Explanatory-Fact-Sheet-for-the-Justice-Miscellaneous-Commission-of-Inquiry-Bill-2024-Consultation-Draft.pdf)

124A. Penetrative sexual abuse of child or young person by person in position of authority

(1) In this section –

(…)

***person in a position of authority**, in relation to a child, includes the following persons:*

(…)

(c) a person who provides religious, sporting, musical or other instruction to the child;

(…)

(j) an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

In relation to the provision of religious, sporting, musical or other instruction, there are analogous definitions in NSW,[10] ACT,[11] Vic,[12] SA,[13] and NT[14]. Western Australia employs a catch-all provision of *care, supervision or authority* without particularising the various categories of person referred to.[15] Queensland does not have a similar provision.

The clear difficulty is that this form of drafting has the potential to criminalise the behaviour of similar aged young people involved in factually consensual non-exploitative intimate relationships whose lives are also characterised by relatively mundane arrangements where one young person provides some form of religious, sporting, musical or other instruction or tuition to the other. For example, a 17-year-

[10] Section 73(3)(c), *Crimes Act 1900* (NSW).
[11] Section 55A(2)(d), *Crimes Act 1900* (ACT).
[12] Section 37(1)(i), *Crimes Act 1958* (Vic).
[13] Section 49(9)(c)(d), *Criminal Law Consolidation Act 1935* (SA).
[14] Section 208GC(1)(h), *Criminal Code Act 1983* (NT).
[15] In its final report issued in October 2023, the Law Reform Commission of Western Australia (LRCWA) made a formal recommendation that that state's analogous term, *care, supervision or authority,* should be made the subject of a fully particularised definition. This amendment has yet to be introduced. See LRCWA, *Project 113: Sexual Offences: Final Report*, 2023, pp 246-249 [URL: https://www.wa.gov.au/media/46342/download?inline]

old may be in a consenting sexual relationship with an 18 year old, and the 18 year old may be asked to take up the position of soccer coach for the soccer team of which the 17 year old is a member.

In relation to a person in a position of authority in a work environment (whether paid or voluntary), similar provisions exist in ACT,[16] Vic,[17] SA,[18] and NT[19]. Again, certain workplaces (most notably, in the fast-food industry, but also regional small business retailers) are known to recruit particularly young staff. It is commonplace in this sector for relatively young staff members to be promoted into team leader roles and thereby occupy positions of relative authority with respect to, for example, scheduling, but without the power to terminate. A similar situation exists in the more hierarchical structure that characterises defence force cadets or Scouts where certain young people are promoted to more responsible and accountable positions. Each of these settings elevate the risk profile for young people who are open to engaging in peer-to-peer intimate relationships in these situations.

Under the law, adverse consequences for young people captured by a blunt framework that perversely criminalises their existing safe and normal social and sexual behaviours can be severe, including prosecution and conviction.

2. Consideration of a similar-age defence

In addressing the issue of the breadth of these categories, the Royal Commission noted the following:

> *29. If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.*[20]

[16] Section 55A(2)(e) and (5), *Crimes Act 1900* (ACT).
[17] Section 37(1)(c), *Crimes Act 1958* (Vic).
[18] Section 49(9)(h), *Criminal Law Consolidation Act 1935* (SA).
[19] Section 208GC(1)(c), *Criminal Code Act 1983* (NT).
[20] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, 2017, p. 120 [URL: https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf]

Unfortunately, this was not a matter considered in the Final Report of the CoI. It is noted that the Department of Justice had considered addressing this issue in the draft Bill through introduction of a similar-age defence, but instead chose to invite consultation comments as to whether this should be addressed now or at a later date.[21]

Currently in Tasmania, the *Code* includes a similar-age defence in s.124 (Penetrative sexual abuse of child or young person) and s.125B (Indecent act with child or young person). These defences apply where an accused can prove that the complainant child consented to the conduct and either (a) the child 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) the child was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

The position of authority offence that the draft Bill proposes to amend (s.124A) applies when the alleged perpetrator is 18 years or older (s.124A(2)) and the child is aged less than 18 years (s.124A(1)). Consent to sexual intercourse or an indecent act is not a defence to this charge, although I do note that the marriage defence does apply. An option that warrants further consideration would be to craft a similar-age defence involving a 3-year age differential between a child or young person and an adult 18 years and older. This could be given a limited scope of application in relation to the categories in sub-sections 124A(1)(c) and (j). This would mean that within an instructional or employment setting:

- 18-year-old persons would have a defence in respect of a consensual and non-exploitative relationship with a 15-year-old.
- 18- or 19-year-old persons would have a defence in respect of relationships with a 16- year-old; and
- 18-, 19- and 20-year-old persons would have a defence in respect of relationships with a 17-year-old.

I express no final view on whether a similar-age defence should be included in the draft Bill. Rather, I raise it as an option warranting further and deliberative consideration. I would also not be supportive of any defence of this type applying to some categories of position of authority, for example a teacher, or a student teacher.

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[21] Department of Justice, op cit., [URL: https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/760069/Explanatory-Fact-Sheet-for-the-Justice-Miscellaneous-Commission-of-Inquiry-Bill-2024-Consultation-Draft.pdf)]

3. **Translating concepts from the *Civil Liability Act 2002* across to the *Criminal Code*.**

For the purposes of the Bill, the Government could also consider the option of introducing some of the legislative drafting innovations in other pieces of legislation, such as is found in Part 10C of the *Civil Liability Act 2002* (Tas). For example, s.49J of that Act makes provision for the determination of the vicarious liability of employees by reference to a formula that involves an assessment of whether the abuse perpetrated took place (a) *by virtue of* the person being an employee (i) with authority, power or control over the child, or (ii) the trust of the child, or (iii) the ability to achieve intimacy with the child and (b) the person was able, *by virtue of* that authority, power, control, trust or ability, to perpetrate the child abuse on the child. Such drafting transforms the offence from one involving the almost strict liability of the existing language of s.124A, where liability is based solely on the *existence* of a position of authority, to one that is based on the *abuse* of that position having regard to the unique facts and circumstances characterising the relationship in each case. As stated above, I would not be supportive of this concept being available for certain categories of persons in position of authority such as teachers.

Further consultation with children and young people and the wider Tasmanian community

As noted above, Article 12 of the UNCRC emphasises the participation of children and young people in decision-making processes that affect them. Section 8(1)(e) of the CCYP Act vests in the Commissioner the function of promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives. With the release of its Final Report, we have seen the CoI emphatically highlight the importance of upholding the right of children and young people to participate, and its recommendation that "children and young people's perspectives should be more formally built into Tasmanian Government policy development and decision making".[22] As part of its response to the Commission of Inquiry's findings and recommendations, the Tasmanian Government has committed to implementing the CoI's recommendations 'in a manner that empowers children and young people to have influence and which allows [it] to

[22] Commission of Inquiry, op cit., Vol 1: Executive Summary, p. 13.

continue to hear their voices and learn from those who have previously suffered harm in our institutions'.[23]

The draft Bill has the potential to have very significant impacts on the rights and wellbeing of young Tasmanians. It is my strongly held belief that a consultation period of two weeks is insufficient for the views and opinions of young people to be sought through appropriate mechanisms and considered.

I have discussed with the Department of Justice's Strategic Legislation and Policy team the compelling reasons to allow for further consideration of certain parts of the Bill, particularly s.124A. This further consideration should be informed by a proper, detailed, and fulsome consultation process to take place both with Tasmanian children and young people, as well as the wider Tasmanian community. I formally reiterate that request and note that I would be happy to be involved in discussions about the optimal way in which that consultation process could be planned and carried out.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc: The Hon Guy Barnett MP, Attorney-General
The Hon Roger Jaensch MP, Minister for Children and Youth

[23] 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*, 2023, p. 8 (URL: https://www.keepingchildrensafe.tas.gov.au/___data/assets/pdf_file/0020/327134/Keeping-children-safe-and-rebuilding-trust_final-WEB.pdf]