

Your Ref:
Our Ref:

7 February 2025

Ms Kristy Bourne
Secretary
Department of Justice
Office of the Secretary

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

Dear Secretary

Re: Police Powers and Responsibilities Act – Proposal Paper

Thank you for the opportunity to provide feedback on the Tasmanian Government's *Police Powers and Responsibilities Act Proposal Paper* (Proposal Paper). I welcome the government's commitment to hear from stakeholders and community members so that it has an informed basis for the development of draft legislation to consolidate police powers and responsibilities.

I note also the reiteration in the Proposal Paper of the government's commitments to strengthen supports and therapeutic interventions for children and young people to prevent engagement with the youth justice system. These welcome commitments include implementation of a range of non-criminalising responses to children's behaviour to uphold the rights of children and improve community safety.

I support the government's intention "to reduce complexity for police, minimising the potential for errors, and make the law more accessible to those within the legal system and to the community generally". However, any new legislation will also play an important role in how the government sets the scene for its reforms arising from the Commission of Inquiry, including delivering a raised age of criminal responsibility and raised age of detention. Considering this, it is important that any proposed reforms regarding police powers and responsibilities are in line with and indeed advance this reform work and the promise made by this government to make lasting change for Tasmanian children and young people and our broader community.

I appreciate that the Proposal Paper is not intended to affect youth justice related law and procedure, particularly with respect to arrest (s 24 of the *Youth Justice Act 1997*) and the duties of a police officer once a young person is arrested (s 24A of the *Youth Justice Act 1997*), however the uncomfortable reality is that children and young people in Tasmania currently enter the youth justice system via the adult criminal justice system. The Tasmanian Government's new Youth Justice Model of Care (Model of Care) provides "a coordinated and consistent approach to the delivery of trauma-informed, evidence-based and culturally safe services to children and young people in contact with, or at risk of coming into contact with, the youth justice system, and

supports their families across Tasmania”.¹ It is not immediately apparent whether, and if so how, the Model of Care has informed the development of the Proposal Paper.

Role of the Commissioner for Children and Young People

The *Commissioner for Children and Young People Act 2016* (CCYP Act), which establishes the Office of the Commissioner for Children and Young People, provides that the Commissioner’s general functions include:

- (a) advocating for all children and young people in the State generally;
- (b) advocating for individual children and young people detained under the *Youth Justice Act 1997*
- (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.
- (g) encouraging organisations to establish child friendly mechanisms to assist children and young people to participate in matters that affect them.²

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).³

Comment

The Proposal Paper recognises that, up to the point of arrest, children and young people in contact with the criminal justice system are largely treated no differently to adults in terms of the investigative powers used by police. The Proposal Paper states that there is no intention to change this situation, except with regard to use of force in the exercise of non-arrest powers.⁴ There is a manifest tension in the application of different legal frameworks that guide police interactions with children and young people currently and as proposed - pre-arrest powers, arrest powers and post-arrest powers - that warrants further recognition and consideration in the development of the proposed ‘foundational’ legislation.

¹ Department of Premier and Cabinet, *Youth Justice Model of Care*, December 2024, (URL: https://assets.keepingchildrensafe.tas.gov.au/media/documents/Youth_Justice_Model_of_Care.pdf);

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

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

⁴ See p. 8 of the Proposal Paper which provides that: “The proposed use of force provision would include additional protections that would apply when police exercise their consolidated (non-arrest) powers in relation to youths. These protections would be similar to those that currently apply under section 25E(4) of the *Youth Justice Act 1997* when a search officer conducts a search of a youth.”

The place of the youth justice system (articulated through the *Youth Justice Act 1997*) within the broader criminal justice system, including the police powers and responsibilities associated with both, needs to be fully considered. This is true even more so considering there will be necessary changes to the *Youth Justice Act 1997* and other law to realise the recommendations of the Commission of Inquiry.

Consistent with the Commissioner's legislative role, this Office has had a long-running interest in the area of youth justice demonstrated through a range of work including the provision of advice to the government concerning personal searches of children and young people in custody⁵ and the age of criminal responsibility⁶.

In her 2023 Memorandum of Advice on raising the age of criminal responsibility, which I endorse, the former Commissioner for Children and Young People, Leanne McLean was emphatic in highlighting evidence that justice systems can be criminogenic, with early contact being a key predictor for future offending.⁷ Commissioner McLean noted (footnotes omitted):

Research has found overwhelmingly that the younger children are when they first encounter the system, the more likely they are to re-offend. Youth offenders tend to have higher rates of re-offending than adults. Nationally between 2000-01 and 2019-20, 9 out of 10 children who were first sentenced to youth justice supervision between ages 10 and 12 re-offended and were returned to youth justice supervision before reaching 18.⁸

As the independent advocate for young people detained under the *Youth Justice Act 1997*, I hear regularly from young people about their experience of the criminal justice system, including their interactions with police and correctional officers, judicial officers, lawyers, and time spent in custodial environments including police watchhouses/reception prisons and youth detention. It is by no means unusual to hear young people describe negative and even traumatic and harmful experiences associated with their interaction with police.

The contemplated reforms represent a significant opportunity to make real and positive change for children and the broader community. In this submission I focus on opportunities to strengthen the government's current reform proposals and further promote and protect the rights of children and young people. In accordance with the provisions of the CCYP Act noted above, I have adopted a child rights-based approach to my examination of the Proposal Paper.

As mentioned above, I have a special function to act as an advocate for children and young people detained under the *Youth Justice Act 1997*.⁹ In carrying out this function, I regularly visit Ashley Youth Detention Centre (AYDC) and spend time listening to young people in detention. I

⁵ See Commissioner for Children and Young People, *Memorandum of Advice – Searches of children and young people in custody in custodial facilities in Tasmania*, 7 May 2019 (URL: <https://childcomm.tas.gov.au/resource/memorandum-of-advice/>).

⁶ See Commissioner for Children and Young People, *Memorandum of Advice – The Age of Criminal Responsibility in Tasmania*, 2023 (URL: <https://childcomm.tas.gov.au/resource/memorandum-of-advice-the-age-of-criminal-responsibility-in-tasmania/>).

⁷ Commissioner for Children and Young People, *Memorandum of Advice – The Age of Criminal Responsibility in Tasmania*, 2023 p. 29 (URL: <https://childcomm.tas.gov.au/resource/memorandum-of-advice-the-age-of-criminal-responsibility-in-tasmania/>).

⁸ Ibid.

⁹ Section 10 of the *Commissioner for Children and Young People Act 2016* (Tas).

am supported in this role by the Advocate for Young People in Detention. This means that this office is uniquely placed to understand and give voice to the concerns and grievances of these young people and to communicate their experiences to the government and the community at large. In preparing this submission, I have been informed by the voices and experiences of young people with experience of the criminal justice system, including through our consultations with young people as part of the Voices of Young People in the Youth Justice System project (“Voices Project”).¹⁰ This office will be preparing a paper on these voices of children and young people regarding their interactions with police, including in relation to arrest, which will further serve to bring their stories to the fore.

Quarantining the *Youth Justice Act* from the Proposal Paper reforms

I understand the purpose of the Proposal Paper is to provide a high-level outline of a possible future consolidation of police powers and responsibilities in Tasmania. The Proposal Paper highlights the need to balance police powers with protecting common law, civil, and human rights from arbitrary infringement. However, the Proposal Paper lacks detail about the proposed protections to be included in the legislation that might ultimately apply to children and young people who come to the attention of police because of their behaviour.

Under the heading, ‘Alignment with Government’s youth justice reforms’, the Proposal Paper states:

The Government is committed to strengthening the supports and therapeutic interventions provided to young people to prevent engagement with the youth justice system.

A key step towards achieving this goal was the release of the Government’s Youth Justice Blueprint 2024-2034 in December last year, which outlines the strategic direction of Tasmania’s youth justice system for the next 10 years.

As part of its comprehensive reform of the youth justice system, the Blueprint affirms the Government’s commitment to increasing the minimum age of detention to 16 years by developing alternatives to detention for children aged 14 and 15 years. This change will help ensure that the detention of young people in Tasmania is truly a last resort.

Additional Government reforms include legislation relating to the searching of youth in custodial facilities and the proposal to raise the age of criminal responsibility from 10 to 14 years.

Given these initiatives, it is not intended that the proposed Police Powers and Responsibilities Act will change the existing limitations on the power to arrest a youth, or the associated duties of a police officer where a youth is arrested, that are currently provided for in sections 24 and 24A of the *Youth Justice Act 1997*. The proposed consolidated arrest power will not apply to the arrest of a youth.¹¹

¹⁰ For more information, see: <https://childcomm.tas.gov.au/everyone/major-programs/youth-justice/the-voices-project/>

¹¹ Department of Justice (Tas), *Police Powers and Responsibilities Act – Proposal Paper*, 2024, p. 11 (URL: https://www.justice.tas.gov.au/_data/assets/pdf_file/0011/790976/Proposal-Paper-Police-Powers-and-Responsibilities-Act-November-2024.pdf).

As foreshadowed earlier, despite seeking to insulate the *Youth Justice Act* from the consolidating initiatives contemplated by the Proposal Paper, when it comes to the separate issue of ‘additional consolidated powers’ in the Paper (e.g. the power to demand identifying details, to conduct a search, and to stop and detain), the Executive Summary notes as follows (emphasis added):

It is intended that the additional consolidated powers listed above – relating to demanding identification details, search of persons and stop/detain – *will apply equally to youths and adults, noting that these are preliminary investigative powers that may be exercised prior to police making any decision to arrest.*

Where an arrest is considered necessary and is made in relation to a youth, the special protections currently set out in the *Youth Justice Act 1997* would immediately come into effect.

It is further proposed that the provision outlined above for the use of reasonable force would include additional protections for youth when police exercise the consolidated (non-arrest) powers. These protections would be similar to those that currently apply under section 25E(4) of the *Youth Justice Act 1997* when a search officer conducts a search of a youth. This approach aligns with the intent underlying the Government’s youth justice reforms, to ensure that special care is taken when youths come in contact with law enforcement and the justice system.¹²

This situation, where on the one hand, children and young people are afforded certain protections and treated with ‘special care’ on or after arrest, but on the other hand, are treated no differently to adults during pre-arrest contact with police is enabled by s 23 of the *Youth Justice Act 1997*. This preserves the application of the general law as follows:

23. Application of general law

Subject to this Act, the law of the State relating to investigation, interrogation, arrest, bail, remand and custody applies to youths, with necessary adaptations and any further adaptations that are set out in this Act or the regulations.

The Preamble to the UNCRC repeatedly emphasises the special status of children and young people, noting that ‘childhood is entitled to special care and assistance’, that ‘the child, by reason of [their] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’ and that ‘children need special consideration’.¹³ Child rights-based principles and safeguards are increasingly recognised as necessary in this State when developing and articulating legislative and policy initiatives in relation to children and young people.¹⁴

¹² Ibid., p. 8.

¹³ United Nations Convention on the Rights of the Child, 1989, Preamble (URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>).

¹⁴ See, for example: Second Reading Speech on Hon Elise Archer MP (Youth Justice Amendment (Searches in Custody) Bill 2022) in Tasmanian Parliament, *Record of proceedings* (Hansard – House of Assembly), 4 May 2022, p. 2 (URL: https://www.parliament.tas.gov.au/data/assets/pdf_file/0026/47078/9_of_2022-srs.pdf); Department for Education, Children and Young People (DECYP), *Youth Justice Blueprint 2024–2034*, December 2023, pp. 2, 6, 9, and 33 (URL: <https://www.decyp.tas.gov.au/youth-justice-blueprint-2024-2034>).

In this context, it seems somewhat contradictory that the Proposal Paper continues to apply a double standard to children and young people, treating them as adults during the pre-arrest stages of the continuum and as children and young people deserving of special protections only during and after arrest and detention.

For example, notwithstanding the very real potential for greater numbers of children and young people to be stopped, detained and searched as a consequence of the proposed reforms, the Proposal Paper does not propose to replicate, in a pre-arrest context, the comprehensive safeguards currently afforded to children who may be subject to personal searches in custody in custodial settings.¹⁵ This requires further careful consideration.

As an aside, a statutory right that the Paper contemplates being afforded to adults after arrest is not actually owed to children and young people under the current provisions in the Youth Justice Act 1997. The Paper states (at p. 21) (emphasis added):

It is proposed that the draft Bill includes a requirement that *the person be informed of the grounds of their arrest as soon as practicable* after the arrest is made. This notification need not be technical or precise as to the legislation breached but should make clear the offending conduct to which the arrest relates.

(...)

It is not proposed to change the existing requirements in relation to arresting a youth that are contained in section 24A of the *Youth Justice Act 1997*. These include informing the youth of their right to refuse to answer questions or to participate in investigations, except where required under legislation to do so, and notifying their guardian (if applicable).

However, s 24A of the *Youth Justice Act* does not actually impose a statutory duty on a police officer to inform a child or a young person of the grounds of their arrest. That section simply requires that police advise a child or young person of their right to silence and to refuse to participate in investigations. It is also provided that police must notify the child or young person's guardian if practicable. Finally, pursuant to s 6 of the *Criminal Law (Detention and Interrogation) Act 1995*, police must inform the child or young person of their right to communicate with a friend or relative and a legal practitioner. However, nowhere in the *Youth Justice Act* itself is there a

<https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>);

Department of Police, Fire and Emergency Management (DPFEM), *Child and Youth Safe DPFEM Policy*, September 2024, p. 4 (URL:

https://www.dpfem.tas.gov.au/childsafes/resources/V1.2_DPFEM_Child_and_Youth_Safe_Policy.pdf);

Tasmania Police, *Tasmania Police Manual*, as at 29 September 2024, section 9.1.5(4) (URL:

<https://www.police.tas.gov.au/uploads/Tasmania-Police-Manual-Public-RTI-Version-September-2024-1.pdf>); Tasmanian Government, *Draft Change for Children: Tasmania's 10 year Strategy*, 2024, p. 21 (URL:

https://assets.keepingchildrensafe.tas.gov.au/media/documents/CONSULTATION_DRAFT_Change_for_Children_Strategy.pdf); Department of Premier and Cabinet, *Youth Justice Model of Care*, December 2024, (URL:

https://assets.keepingchildrensafe.tas.gov.au/media/documents/Youth_Justice_Model_of_Care.pdf);

¹⁵ See Commissioner for Children and Young People, *Memorandum of Advice – Searches of children and young people in custody in custodial facilities in Tasmania*, 7 May 2019 (URL:

<https://childcomm.tas.gov.au/resource/memorandum-of-advice/>); Second Reading Speech on Hon Elise Archer MP (Youth Justice Amendment (Searches in Custody) Bill 2022) in Tasmanian Parliament, *Record of proceedings* (Hansard – House of Assembly), 4 May 2022, p. 2 (URL:

https://www.parliament.tas.gov.au/data/assets/pdf_file/0026/47078/9_of_2022-srs.pdf); *Youth Justice Act 1997*, Part 3, Division 3.

legislated obligation on police to inform a child or young person of the grounds of their arrest. The only mechanism by which this might be taken to be imported back into that Act is via s 23 that preserves provisions of the general law which are not inconsistent with the *Youth Justice Act*. This is a defect in the legislation that should be addressed.

A similar issue arises with the proposal that the foundational legislation includes a requirement that the arresting police (or custody officer) notify the current provider of Aboriginal legal services, and facilitate the service being able to communicate with an arrested person who is an Aboriginal person to provide legal advice and support. Consideration should be given to including a proactive requirement that police notify an appropriate legal service when any child or young person is arrested and facilitate confidential communication for the purpose of legal advice and support. This is not currently required by section 24A of the *Youth Justice Act 1997*. My observations are by no means intended to be exhaustive.

Reducing the number of young people entering detention

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings made the following assessment in its final report (footnote omitted, emphasis added):

Children and young people in youth detention facilities are at increased risk of child sexual abuse by adult abusers and children and young people engaging in harmful sexual behaviours. *An important mechanism to minimise this risk is to reduce the number of children and young people entering detention. This requires a range of strategies to prevent children and young people becoming involved with the youth justice system, divert those who come into contact with police away from formal criminal justice processes, and ensure children and young people who do face criminal proceedings are supported to address their offending behaviour in the community rather than in detention.*¹⁶

Based on this assessment, the Commission of Inquiry made the following Recommendation in its final report:

Recommendation 12.12

The Tasmanian Government should ensure legislation to replace or amend the *Youth Justice Act 1997* contains updated general principles of youth justice that reflect contemporary understandings of child development, children's antisocial behaviour and children's needs.¹⁷

In addition to the review of the *Youth Justice Act 1997* and a suite of other initiatives concerning diversionary options, bail, and sentencing, the Commission of Inquiry also recommended training for police officers:

¹⁶ Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children*, (Volume 5 (Book 3): Chapter 12), 2023, p. 76 (URL: <https://www.commissionofinquiry.tas.gov.au/report>).

¹⁷ *Ibid.*, p. 84.

Recommendation 12.34

1. (...).
2. Tasmania Police should ensure its members receive regular training and guidance on laws and procedures on the use of isolation, the use of force and searches of children and young people in detention to enable police to readily identify conduct that falls outside the parameters of acceptable professional conduct among staff and may constitute a criminal offence.¹⁸

The Proposal Paper represents a promising opportunity for the government to open up a community-wide discussion on the question of whether the powers and responsibilities that police have in relation to children and young people that are contained in both the general law and in the *Youth Justice Act 1997* should be harmonised using a child rights lens that is consistent with the special and vulnerable status of children and young people. I am concerned that the Proposal Paper applies a generalised approach that could be detrimental to the rights and wellbeing of children and young people. We know from the Commission of Inquiry that ‘detaining children and young people is damaging, has a criminalising effect and does not reduce offending.’¹⁹ Some of the changes contemplated by the Proposal Paper are likely to increase children and young people’s contact with the criminal justice system representing a grave missed opportunity for driving systemic and cultural change.

Now is the time to engage in a discussion about how to re-envision frontline policing with respect to children and young people and consider innovative child-centred approaches to manage the first point of contact between police and children and young people. The *Youth Justice Blueprint*²⁰ and the *Model of Care*²¹ are currently being implemented leading up to a new minimum age of criminal responsibility (14 years), a new minimum age of detention (16 years), and a reformed service system. These very welcome policy commitments involve providing ‘prevention, early intervention and diversion pathways that prioritise the needs of the young person, and also consider and improve the safety of the broader community in which they live’. It is vitally important that we start building the foundations for this non-criminalising system now, including by considering how relevant police powers and responsibilities must adjust to best support this shift.

Simplicity versus complexity

In the Executive Summary of the Proposal Paper, the primary rationale for consolidating police powers and responsibilities is stated to be as follows:

¹⁸ Ibid., p. 235.

¹⁹ Commission of Inquiry into the Tasmanian Government’s Responses to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the safety of Tasmanian children*, (Volume 5 (Book 3): Chapter 12), 2023, p 77 (URL: <https://www.commissionofinquiry.tas.gov.au/report>).

²⁰ Department for Education, Children and Young People, *Youth Justice Blueprint 2024-2034 – Keeping children and young people out of the youth justice system*, December 2023 (URL: <https://publicdocumentcentre.education.tas.gov.au/library/Shared%20Documents/Youth-Justice-Blueprint.pdf>).

²¹ Department for Education, Children and Young People, *Youth Justice Model of Care*, 2024 (URL: https://assets.keepingchildrensafe.tas.gov.au/media/documents/Youth_Justice_Model_of_Care.pdf).

Police powers are currently contained within multiple pieces of Tasmanian legislation, with otherwise comparable powers in different Acts incorporating varying limitations, obligations and thresholds. These differences make the law more challenging to apply in practice, and more difficult for members of the community to understand.

This paper provides a first step towards developing a Bill for a Police Powers and Responsibilities Act that consolidates inconsistently replicated police powers and the responsibilities police have when exercising them. In doing so, the paper seeks to eliminate the complexity that currently exists, while balancing the powers the police should legitimately have with protections for those against whom they are applied.²²

While the Proposal Paper displays an intent to streamline and harmonise the law and make it both easier for police to administer and for the community to understand, the proposals currently fall short in tackling pre-arrest procedures that can be applied generally to both children and young people and adults. This can lead to yet greater confusion for police officers and blur the difficult yet very real legal distinctions and protections that must be applied during the arrest of a young person – s 24 of the *Youth Justice Act 1997* is titled significantly “**Limit on power to arrest**” – and subsequently in detention.

In her Memorandum of Advice to Government on raising the minimum age, former Commissioner McLean noted:

Overwhelmingly, evidence, including the work prompting this Advice, demonstrates that children come into conflict with the law because of factors including disadvantage, disability and trauma. In other words, children’s contact with the law is often a direct result of not having what they need to grow and thrive. In making this point, I acknowledge that the responsibility for this is not, nor can it ever be, entirely the responsibility of government. However, it is the responsibility of government to ensure that the laws which frame and guide the context within which children and young people exist, and the service systems that interact with them, do indeed support children to grow and thrive.²³

The government has accepted the need to raise the minimum age of criminal responsibility through the development of therapeutic, non-criminalising responses to prevent and respond to children’s harmful behaviour. This needs to be supported by reforms to the service system and revision of the law, policies and procedures governing contemporary policing in Tasmania. The time has come to meaningfully consider the innovations necessary to support this transformation and how to embed it through law, policy and service delivery. I urge the government to give consideration to laying the foundation for these initiatives and how to harmonise them with the pre-arrest contact that police have with children and young people.

²² Department of Justice (Tas), *Police Powers and Responsibilities Act – Proposal Paper*, 2024, p. 5 (URL: https://www.justice.tas.gov.au/_data/assets/pdf_file/0011/790976/Proposal-Paper-Police-Powers-and-Responsibilities-Act-November-2024.pdf).

²³ Commissioner for Children and Young People, *Memorandum of Advice – The Age of Criminal Responsibility in Tasmania*, 2023, p. 20 (URL: <https://childcomm.tas.gov.au/resource/memorandum-of-advice-the-age-of-criminal-responsibility-in-tasmania/>).

Other matters

I have had the benefit of considering the considered submission made the Tasmanian Council of Social Services and support its calls for:

- Implementation of a community awareness campaign regarding police powers and responsibilities
- Increased training and support for police. (See also the recommendation of the former Commissioner regarding equipping police with the training, skills and expertise necessary to respond effectively to the needs of children and young people ²⁴)
- The establishment of protocols and other measures aimed at reducing criminalisation of children (especially highly vulnerable children e.g. with experience of the child safety system).

I also take this opportunity to draw to your attention my recent feedback on the consultation draft Police Offences Amendment Bill 2024 noting its relevance to the matters considered by the Proposal Paper.²⁵

I once again thank you for the opportunity to provide feedback.

Yours sincerely



Isabelle Crompton

Interim Commissioner for Children and Young People

cc. Hon. Jeremy Rockliff, Premier

cc. Hon. Guy Barnett, Attorney-General

cc. Hon. Roger Jaensch, Minister for Children and Youth

cc. Hon. Felix Ellis, Minister for Police, Fire and Emergency Management

²⁴ See also Commissioner for Children and Young People, *Memorandum of Advice – Searches of children and young people in custody in custodial facilities in Tasmania*, 7 May 2019 (URL:

<https://childcomm.tas.gov.au/resource/memorandum-of-advice/>

²⁵ <https://childcomm.tas.gov.au/resource/police-offences-amendment-bill-2024/>