

Your Ref:

Our Ref:

21 October 2022

Ginna Webster
Secretary
Department of Justice

By email to: secretary@justice.tas.gov.au

Dear Secretary

Re: *Justice Miscellaneous (Royal Commission Amendments) Bill 2022*

Introductory comments

Thank you for the invitation to advocate on behalf of all Tasmanian children and young people by commenting on the *Justice Miscellaneous (Royal Commission Amendments) Bill 2022* (the draft Bill).

Role of the Commissioner

My role as Commissioner for Children and Young People is governed by the *Commissioner for Children and Young People Act 2016* (CCYP Act).

Section 8 of the CCYP Act outlines some of my functions as follows:

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



In performing my functions, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount;
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child*; and
- give special regard to the needs of children and young people who are disadvantaged or vulnerable.

Legislation to progress recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (“Royal Commission”) is clearly a matter relevant to my functions as Commissioner.

Comment

My comment is confined to a consideration of clauses 7(a) and 7(b) of the draft Bill, namely the proposal to introduce a new offence of “Failure by a person in authority to protect a child from a sexual offence” and the proposal to introduce a new “Presumption as to lack of consent to sexual conduct” (related to persons under 17 years of age or with a mental impairment).

My comment is focussed on how these draft laws could potentially affect children and young people and is not intended to be exhaustive.

Clause 7(b) - Presumption as to lack of consent to sexual conduct

Clause 7(b) of the draft Bill proposes to amend the *Criminal Code Act 1924* (Code) by inserting s 126A into the Code, creating a presumption that a person under 17 years of age or a person with a mental impairment is unable to consent to sexual conduct with a person in a position of authority. The presumption would apply in relation to sexual offences against children and young people aged less than 17 years of age where the absence of consent is an element of the offence.

Earlier in October, I had the benefit of receiving a briefing on clause 7(b) of the draft Bill from representatives of the Tasmanian Law Reform Institute (TLRI), including Emeritus Professor Kate Warner. I subsequently had the opportunity to consider the *Research Paper on the Justice Miscellaneous (Royal Commission Amendments) Bill 2022, s 126A* (“Research Paper”)¹ relating to the proposed insertion of s 126A in the *Criminal Code 1924* (Tas) (“Code”).

It is my understanding that the proposed provision aims to create a rebuttable presumption that any person under the age of 17, or any person with a mental impairment, is “unable to consent to sexual conduct with a person who is in a position of authority”. My understanding is that the Research Paper is being submitted to the Department of Justice as part of the community consultation process for the draft Bill.

¹ Isabelle Dadswell (TLRI Intern and Vanessa Goodwin Scholar), *Research Paper on the Justice Miscellaneous (Royal Commission Amendments) Bill 2022, s 126A*, (Presented in private correspondence with the Commissioner for Children and Young People).



In my respectful opinion the Research Paper sets out a comprehensive and compelling case to revisit and reconsider the proposed addition of section 126A into the Code. It presents a persuasive argument that the proposed change in the law to be brought about by the rebuttable presumption in s 126A does not adequately implement the relevant Royal Commission recommendations in relation to “Position of authority offences”.²

I am concerned that the proposed s 126A may have negative unintended consequences for children and young people, including for how they might be dealt with as complainants in the criminal justice system.

As well as noting the concerns and issues related to the insertion of s 126A highlighted by the Research Paper, I wish to point out the following matters which I believe require further consideration. These matters include: the appropriateness or otherwise of restricting the scope of the presumption to those under the age of consent (i.e., to persons aged less than 17 years); the broad application of the provision (i.e., it is not limited to adults in a position of authority); and the complexity that this provision will introduce particularly with respect to how, as a matter of fact, the presumption can be rebutted.

I note the Research Paper recommends that the proposed reform instead encompasses a standalone provision criminalising sexual conduct between a person in a position of authority and a minor, as is reflected in all other jurisdictions in Australia, except Queensland.

Critically, in the jurisdictions where there is a standalone provision (New South Wales, Victoria, South Australia, Western Australia, Australian Capital Territory, Northern Territory, and the Commonwealth), consent of the victim is not a consideration, and relevant defences to the crime are expressly provided. The rationale for adopting the rebuttable presumption approach outlined in s 126A is unclear to me, when the standalone provisions implemented in other jurisdictions appear to be working successfully as a “direct method of achieving the recommendations of the Royal Commission”³. It appears to me that a standalone crime of sexual penetration and sexual assault of a person below the age of 18 years under “care, supervision, or authority”⁴ would be a simpler and more effective means of protecting children and young people from sexual abuse by adults in positions of authority.

Based on the analysis contained in the Research Paper, I am of the view that the approach adopted in s 126A of the draft Bill is “flawed”⁵. Based on the information available, I do not believe the addition of s 126A to the Code will bring the criminal law into line with community expectations and will make it harder for children and young person victim survivors to achieve justice. I recommend and strongly urge the Government to revisit and reconsider clause 7(b) of the draft Bill in the light of the matters raised by the Research Paper.

² Royal Commission into Institutional Responses to Child Sexual Abuse, [‘Final Report - Recommendations’](#), Recommendations 27-29.

³ *Research Paper*, p. 1.

⁴ See definition in *Crimes Act 1958* (Vic), s 37.

⁵ *Research Paper*, p. 10.



Clause 7(a) - Failure by a person in authority to protect a child from a sexual offence

I welcome clause 7(a) of the draft Bill regarding the insertion of the offence of “failure by a person in authority to protect a child from a sexual offence” into the Code.

Under the proposed s 125E, a person in authority in a relevant organisation is required to protect children from a “substantial risk” of a sexual offence being committed by an adult associated with that organisation if they know of the risk. They must not wilfully or negligently fail to reduce or remove a risk which they have the power or responsibility to reduce or remove. As observed by the Royal Commission, this offence is “primarily designed to *prevent* child sexual abuse rather than to bring abuse that has occurred to the attention of the police.”⁶

If the circumstances and elements contemplated in the offence arise, I am hopeful that interventions may occur quickly to reduce or remove the risk to children, and so prevent child sexual abuse from ensuing. I am pleased to see that the key elements of recommendation 36 of the Royal Commission have been incorporated into the proposed new offence provision.

Conclusion

I thank you for the opportunity to comment on this important draft Bill. I also acknowledge the assistance of Ms Isabelle Dadswell and Emeritus Professor Kate Warner in bringing the information and issues outlined above in relation to clause 7(b) to my attention.

I am available to discuss my comments if that would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc Hon Jeremy Rockliff MP, Premier of Tasmania

cc Hon Elise Archer MP, Attorney-General, Minister for Justice, Minister for Corrections and Rehabilitation

cc Hon Roger Jaensch MP, Minister for Education, Children and Youth

⁶ Commonwealth of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse*, ‘Criminal Justice Executive Summary and Parts I – II’, p. 55.