DRAFT SECOND READING SPEECH

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Justice Miscellaneous (Commission of Inquiry) Bill 2024

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Honourable Speaker, I move that the Bill now be read a second time.

The Justice Miscellaneous (Commission of Inquiry) Bill 2024 implements a number of the recommendations made by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings. The Commission's report contains 191 recommendations, all of which will be implemented by the Tasmanian Government, with the aim of better protecting children and young people in this state. This Bill is another step towards fulfilling that commitment.

I thank the victim-survivors that participated in the Commission's process. I thank you for your patience and I recognise that while this Bill is an important one, there is much work still to be done. I also extend my sincere thanks to everyone else who assisted the Commission's work, and by extension, contributed to this important law reform.

I will now turn to the amendments contained in the Bill.

Apologies in Civil Litigation

The first amendments in the Bill relate to apologies given in proceedings governed by the *Civil Liability Act 2002*. These amendments implement recommendation 17.5 and reflect aspects of related recommendation 17.4.

Honourable Speaker, the provisions in the tabled Bill are somewhat different to those in the consultation Bill. In the latter, the reforms would have been in Part 10C of the Act, which deals with liability of organisations for child abuse. In this Bill, the provisions are in Part 4 which deals with apologies. This change reflects stakeholder feedback and other advice taken during the drafting process.

I wish to clearly state support for Commission's recommendation17.4, which begins with these sentence:

> "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".

Legislation is not the sole tool for promoting trauma-informed apologies. The Department of Justice is progressing other work to supplement the legislation and guide government institutions through this process. This resource will be publicly available.

The Commission recommended amending the Civil Liability Act to ensure that an apology in relation to child sexual abuse can be made without amounting to an admission of liability. It wrote that the Tasmanian Government and government institutions should be able to apologise in relation to child sexual abuse without compromising any defence the Tasmanian Government may have, for example, based on all reasonable steps having been taken to protect a child from abuse. The Commission stated there should be no legal disincentive to apologising.

For child abuse proceedings covered by the *Civil Liability Act 2002*, section 49N(3) of that Act makes the State the proper defendant for an unincorporated organisation that is a Government department established under the *State Service Act 2000*. Furthermore, section 5 of the *Crown Proceedings Act 1993* states that generally, proceedings may be brought by or against the Crown under the name "The State of Tasmania".

The Civil Liability Act defines 'child abuse' to mean sexual and physical abuse as well as any consequential psychological abuse.

The Bill adds provisions regarding organisations who may be legally responsible for child abuse allegedly perpetrated by an associated individual. Such a person can include an employee, officer or volunteer of the organisation.

The new provisions apply regardless of whether alleged child abuse occurred before, or after, the commencement of this Bill. However, they will not apply to civil proceedings which were finished before the Bill receives the Royal Assent, for reasons of finality. They will also not apply to those which have started, but not finished, when the Bill receives the Royal Assent. This is because parties to litigation must be able to count on the consistency of the law about their evidence, from start to finish.

The Bill states that an apology, as defined, does not constitute an express or implied admission of fault or liability by the organisation in respect of the child abuse. It makes the apology irrelevant to determining fault or liability for the child abuse apologised for. It makes the apology inadmissible as evidence in civil proceedings of the organisation's fault or liability regarding that abuse.

An apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion in connection with child abuse. To be protected, it cannot contain an admission of fault or liability in connection with the intentional act that is the abuse - being the perpetrator's physical actions.

This is consistent with the wording of the definition of apology and the wider apology provision in section 7 of the Act, prior to the amendments in this Bill taking effect.

Significantly, the Bill expressly states that an apology could include an acknowledgement of the abuse and its impact. It could also include information about the person's time under the organisation's responsibility and information about past or future steps to protect against further child abuse of children.

This will not force an organisation to make an apology, but it will remove what may have been a legal concern which stopped organisations from doing so.

Criminal Code Offences

Honourable Speaker, the Bill amends several sexual offences in the *Criminal Code*, in accordance with recommendation 16.9.

Position of Authority Offences

Section 124A of the Code creates the offence of penetrative sexual abuse of a child or young person by a person in a position of authority. As the title of the section suggests, that offence does not extend to non-penetrative sexual acts.

The Bill inserts two additional 'position of authority' offences, capturing indecent acts with, or directed at, a child or young person, and indecent assault. These are contained in new sections 124B and 124C. All three of these position of authority offences can only be committed by those aged 18 and over, as recommended by the Commission.

These amendments acknowledge that there is no real reason to distinguish between penetrative and non-penetrative acts – neither should be engaged in by a person who is in a position of authority in relation to a child or young person, subject to the defence that I will speak about in a moment. We know that offenders will often try to groom a child or young person prior to engaging in penetrative sexual acts, and as such, it is important that the position of authority offences capture this conduct. The creation of these new offences necessitates consequential amendments to a number of other Acts, such as the *Corrections Act 1997* and *Evidence (Children and Special Witnesses) Act 2001*.

Amendments have also been made to include a 'similar age defence' in respect of each of these three crimes. While this issue was not directly addressed by the Commission of Inquiry, it is an issue that was alluded to by the National Royal Commission and was the subject of extensive feedback during consultation on this Bill. The vast majority of, if not all, stakeholders supported the introduction of a similar age defence into these crimes.

Generally, consent would not be a defence to these crimes. This amendment will provide that consent is a defence, but only where the accused person is not more than 2 years older than the child or young person. Because these offences can only be committed by those who are aged 18 and over, this defence would only arise where complainants are aged 16 or 17, and the accused aged 18 or 19. This defence is stricter than existing similar age defences in the *Criminal*

Code, such as in subsection 124(3), and that difference recognises that a smaller age gap is appropriate when there is an alleged position of authority dynamic between the two people involved.

It's important to remember that from a defence perspective, closeness in the ages of the complainant and accused only matters if there was consent. A person does not consent, as defined in section 2A of the Criminal Code, if they agree or submit because they are overborne by the nature or position of the other person. Therefore, this defence will involve an assessment of the particular facts of the case and scrutiny of the relationship between the two people involved.

This is a difficult area to legislate in, and it's important to strike a balance between respecting the autonomy of young people to have sexual relations with people who are close in age to them, while protecting them from exploitation by adults who are in a position of authority in respect of them.

Persistent Sexual Abuse of a Child or Young Person

The Bill contains various amendments to section 125A, which creates the offence of persistent sexual abuse of a child or young person. This is a very important crime in our *Criminal Code*. It is used in cases where there has been repeated, often systematic, sexual abuse of a child. The charge is made out where, during a specified period, the accused commits at least three unlawful sexual acts in relation to a child or young person under the age of 17 years (and they were not married to that child or young person).

This charge is a most effective tool because it does not require the prosecution to prove the dates on which any of the unlawful sexual acts occurred, nor the exact circumstances of the acts. This is critical for ensuring perpetrators of this abuse are held to account. As the Commission of Inquiry noted, young children in particular may not have a good sense of dates and times, making it difficult for them to provide the standard of evidence usually required. This difficulty is compounded in cases where the sexual abuse has continued in a similar way over a lengthy period of time, making it difficult for the child or young person to distinguish between all of the different occasions.

Honourable Speaker, the first amendment to this crime is to subsection (1), to specifically include all three position of authority offences as 'unlawful sexual acts' for the purpose of establishing the offence of persistent sexual abuse of a child or young person. That is, the prosecution may rely on any of the offences in sections 124A, 124B or 124C to make up the three occasions necessary to prove the crime of persistent sexual abuse of a child or young person.

Section 125A is further amended to remove language referring to 'maintaining a sexual relationship with a young person' and replacing it with 'commits the persistent sexual abuse' of a person under the age of 17. This amendment acknowledges that the current terminology is outdated and could imply some element of consent on behalf of the child or young person. This change has been a long time coming, and to that end, it would be remiss of me not to mention, as the Commission did, the advocacy of the Grace Tame Foundation in this space.

I emphasise that this amendment is not intended to change the substantive law in any way. Section 125A should continue to capture the same conduct it currently does, simply by a different, more appropriate, name. This also brings the provision itself into line with a previous amendment to change the title of the offence.

Failure by Person in Position of Authority to Protect a Child

The final offence being amended by this Bill is section 125E, being the offence of failure by a person in a position of authority to protect a child from a sexual offence. That is a simple amendment to restrict that offence to accused who are at least 18 years of age. As detailed by the Commission, it would be inappropriate to hold a child responsible for failing to protect another child from sexual abuse by an adult, and that is not the intention of that offence. This is also consistent with the recommendation of the National Royal Commission.

Pre-Trial Rulings & Directions

Recommendation 16.14 of the Commission's report relates to improving the process around pre-trial arguments (those being arguments before a jury is sworn). Pre-trial rulings enable legal issues to be resolved prior to the trial proper, which gives the parties certainty about the issues, and avoids wasting jurors' time while legal disputes are resolved. Sometimes the legal issues to be resolved are so significant that, particularly for more complex matters, there may need to be several months between the ruling being given, and the trial being held. Other times, there is a delay between the conduct of the legal argument, and the conduct of the trial, simply because of the availability of judicial officers. For example, the delay may be because the judge who heard and ruled on the pre-trial legal argument is sitting in another location, or in the civil jurisdiction, and therefore unavailable to hear the trial for some time.

Currently, section 361A(1) of the *Criminal Code* requires the accused to enter a plea before pre-trial argument can take place. That requirement means that the trial has formally commenced by virtue of section 351(5). This creates difficulty when the judge who conducted the legal argument is unable to hear the trial proper for some time. One option to work around this is for the judge who heard the legal argument to formally 'abort' the trial after making a ruling, so that it can proceed before a different judge. However, some judges are hesitant to abort trials in this way. This amendment is intended to remedy this issue, by removing the requirement for a plea to be entered before pre-trial legal argument can take place, which means the trial will not have formally commenced, in turn making it easier for the matter to proceed before a different judge if necessary. Fundamentally, this amendment was recommended by the Commission with the intention of minimising delay in the trial process for all parties.

The remaining amendments to section 361A relate to the status of a pre-trial ruling. Subsection (2) already provides that if there is a new trial, the pre-trial ruling or order will stay in effect. The new subsection (3) clarifies that, despite subsection (2), the ruling or order may be departed from if it would not be in the interests of justice for the ruling to stay in force, or if the ruling is inconsistent with an order made on appeal.

Trial Direction in Family Violence Prosecutions

The Bill includes an amendment to section 371A of the *Criminal Code*, which contains a requirement for a trial judge, in certain trials such as those involving sexual offences, to give a direction to the jury regarding 'recent complaint'. When there is evidence that tends to suggest an absence of complaint, or a delay in the making of a complaint, about the alleged commission of the crime, the trial judge is required to warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the crime was committed is false; and also to inform the jury that there may be good reasons why such a person may hesitate in making, or may refrain from making, a complaint. The amendment extends the application of this section to crimes of family violence.

This amendment is not a Commission of Inquiry related one. It was contained in a Bill that progressed through this place late last year, but lapsed when Parliament was prorogued. While that Bill will be retabled, this amendment was removed and inserted into this Bill because, initially, this Bill was going to include some other amendments to jury directions, as recommended by the Commission. I will return to why those amendments are no longer included in this Bill, however that is why this single amendment to trial directions is contained in this Bill.

Tendency and Coincidence Evidence

Honourable Speaker, the Bill amends both the *Criminal Code* and *Police Offences Act 1935* to remedy a legal issue which prevents certain evidence being led in some prosecutions, consistent with recommendation 16.13 of the Commission.

If proceedings for a summary offence are instituted in the Magistrates Court, but discontinued, the prosecution will 'tender no evidence', and an acquittal is entered. Once this occurs, there is no power for the case to be reopened. This is because, in effect, the prosecution, upon being put to proof, is declining to present any evidence to support the charge. The result is that the prosecution has not proved its case and the outcome of the hearing is an acquittal.

Where a proceeding has been finally determined by the entering of an acquittal, complainants cannot seek to later have that case revisited or reopened. The Commission did not recommend altering this position.

However, the situation is more complex if there are subsequent proceedings, and the prosecution seeks to use the evidence relevant to that initial charge as tendency, coincidence or relationship evidence in that subsequent prosecution. If evidence relevant to the initial charge cannot be led, the fact finder is arguably deprived of important evidence that would likely strengthen the prosecution case, provide context to the alleged offending and may demonstrate that the offending is not isolated. Section 13B of the *Family Violence Act 2004* was introduced in 2017 to remedy this issue in relation to family violence matters, and the Commission recommended an equivalent provision for sexual offences.

Accordingly, proposed new section 430 of the *Criminal Code*, and new section 39A of the *Police Offences Act*, ensure that where the prosecution tenders no evidence for an alleged family violence

or sexual offence and the defendant is acquitted for that reason, the evidence that would have been led had that matter proceeded is capable of being used as tendency, coincidence or relationship evidence in subsequent court proceedings for family violence or sexual offences involving the same defendant.

I emphasise that this amendment does not impact the existing rules regarding the admission of tendency and coincidence evidence as contained in the *Evidence Act 2001*. This provision simply means that evidence is available to be used for that purpose, however it remains subject to all existing admissibility requirements and exclusionary restrictions.

Registration to Work with Vulnerable People

The Bill implements recommendation 18.2, which relates to the risk assessment process within the Registration to Work with Vulnerable People scheme. Arguably,
this is the most fundamental aspect of the scheme.

Each applicant is assessed so that the Registrar can determine whether the person poses an unacceptable risk of harm to vulnerable people, including children. If the Registrar receives information that a registered person has engaged in any behaviour which poses a risk of harm to vulnerable people, they are to conduct another risk assessment. A person who poses an unacceptable risk of harm cannot get, or retain, registration.

There are certain things which the Registrar can and cannot consider when they conduct a risk assessment. These things are set out in the *Registration to Work with Vulnerable People Act*, and in Ministerial Orders for risk assessment, which I approve as Attorney-General. The Commission found that at times, the Registrar had adopted too high an evidentiary threshold when assessing whether certain people posed an unacceptable risk to children. Amendments to the *Registration to Work with Vulnerable People Act* within this Bill clarify the risk assessment process, to further enhance the safety of children and other vulnerable people.

Honourable Speaker, the Commission emphasised that risk assessment is a predictive exercise to assess *future* risk, and it is not limited to facts which have been objectively proved in the past. These amendments ensure that when assessing risk, the Registrar must consider whether a particular allegation has been proven on the balance of probabilities, but then must go beyond that to further consider whether the person poses an unacceptable risk of harm regardless of whether the allegation is proved. For example, a person who has been the subject of separate, consistent allegations, from different people at different times, may pose an unacceptable risk of harm even if none of the allegations have been proven in a court.

The Commission also noted that there were powers in the Act to suspend a person's registration to work with vulnerable people, but that further guidance on when this power could be used was required. This Bill amends sections 49 and 49A of the *Registration to Work with Vulnerable People Act* to clarify that the power to suspend registration can be used in situations where there would not yet be a power to cancel. In other words, the Registrar can suspend registration on less evidence than they would need to cancel. This ensures that vulnerable people are kept safe in the

short term, while preserving the rights of registered persons to only have their registration cancelled upon sufficient evidence, to receive reasons for any decision to cancel, and to challenge any decision to cancel in a court of law.

The Commission emphasised the importance of the Registrar being able to consider *any* factor which indicates a person may pose a risk of harm to vulnerable people. The rules of evidence, such as those that restrict the use of evidence of a person's tendency to abuse, do not apply. The Commission also recommended that it be made clear that once it is determined that a person poses a risk of harm to vulnerable people, their registration must be refused, suspended or cancelled regardless of other factors, including things such as mental health or employment.

Under the amendments in this Bill, once a person is deemed to be an "unacceptable risk", the Registrar cannot consider the impact that not being registered may have on the person. If it is required for the safety, welfare or protection of vulnerable people that a person not be registered, then they simply cannot be registered.

Sentencing for Child Sexual Offences

The Commission emphasised that the language used by those involved in the criminal justice process can have a 'powerful and sometimes devastating effect on victim-survivors', as well as 'a broader symbolic effect on the understanding of child sexual abuse'. The Commission expressed particular concern about references to 'consent' in the context of child sexual abuse offences, noting that discussing the notion of consent in child sexual abuse matters 'perpetuates outdated ideas about where responsibility sits' and has 'potential to reinforce victim-survivors' fears that they are to blame for the abuse, which they are not'.

The Commission's recommendation in part 1 of recommendation 16.18 is to amend s 11A of the *Sentencing Act 1997* to specify that, in determining the appropriate sentence for an offender convicted of a child sexual offence, the acquiescence or apparent consent of the victim is not a mitigating circumstance. That is what this amendment does.

Importantly, this reflects existing case law – even if there is consent, in cases in which it is no defence, it is not mitigatory. There is no unfairness to the accused because they will be sentenced on a neutral basis – the presence of any apparent consent neither increases, nor reduces, the severity of the sentence for this type of offence. That is not to say that the factual circumstances are irrelevant, but the mere fact of apparent consent will not be mitigatory.

Update on Commission of Inquiry Work

Before concluding, I would like to provide an update to the House, and all other interested stakeholders, about the progress on some other recommendations, or other aspects of recommendations.

Firstly, recommendation 16.15 which relates to trial or jury directions. While the Commission suggested this recommendation be implemented by July 2026, efforts were made to progress those amendments sooner, acknowledging how important these directions are to the trial process.

For that reason, amendments implementing the Commission's recommendation were included in the consultation draft of this Bill.

However, it became evident during consultation on this Bill that more comprehensive consultation, particularly with legal stakeholders, needs to be undertaken on these amendments to make sure we get them right. I am hopeful we may still be in a position to progress those amendments this year, however I will await the outcome of that further consultation and provide an update in due course.

In relation to part 2 of recommendation 16.18, I can advise that the Director of Public Prosecutions has updated his Prosecution Policy and Guidelines to reflect that where consent is not an element of the offence or an available defence, the language of consent should not be used by prosecutors in any sexual assault prosecution. In respect to prosecutions for persistent sexual abuse of a child or young person, the guidelines stipulate that prosecutors must identify the unlawful acts by reference to the crime.

I would like to thank all of the stakeholders who met with Departmental officers to discuss the contents of the Bill, or provided a written submission.

I am pleased to progress these amendments which I am confident will have positive outcomes for our state.

Honourable Speaker, I commend the Bill to the House.