Tasmania Legal Aid

Tasmania Legal Aid's response to the Joint Sessional Committee- Commission of Inquiry Recommendations Scrutiny Committee

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FOR PUBLICATION

Executive Summary

Tasmania Legal Aid (TLA) is the main provider of legal assistance in Tasmania. In 2022-2023 we were responsible for delivering over 72,000 client services.

TLA is the largest government funded legal assistance service in Tasmania with offices in Hobart, Launceston, Devonport and Burnie. We are responsible for providing the majority of legal services to young people and children in our community. TLA represents children charged with criminal offences, as well as representing the interests of children in child safety, mental health treatment and family law cases. This experience provides a unique insight into the interaction of children with the justice and child safety systems—what works well, and what doesn't. As young people increasingly require legal information, advice and representation, TLA has approached this submission from a client-centric perspective.

We also provide legal advice and assistance to victim survivors of institutional sexual abuse regarding their options for seeking compensation and redress. This statewide service was launched in August 2024 and is provided by our TasVOCAL (Tasmanian Victim-Survivors of Child Abuse Legal) program.

Tasmania Legal Aid (TLA) welcomes the opportunity to comment on the implementation of the COI recommendations. TLA is driven to ensure that the Tasmanian community, especially children and young people, are safe, respected and have their voices heard.

TLA provides information and makes recommendations throughout this submission to the Joint Sessional Committee based on our role, services and experience delivering legal services that intersect with the implementation and delivery of the Government's response to the Commission of Inquiry recommendations.

About TLA

The Legal Aid Commission of Tasmania (known as Tasmania Legal Aid) is an independent statutory body established under the *Legal Aid Commission Act 1990* (Tas). TLA's functions include the provision of legal aid services, liaising with private practitioners and their professional and peak bodies, as well as ensuring aid is provided in the most effective, efficient and economical way to the Tasmanian community.

TLA's Strategic Plan for 2023-27 identifies children and young people as a focus of the organisation with a commitment to put children and young people at the centre of service delivery. As an organisation, we have an increased awareness of the need to nurture children to help them develop into healthy adults and understand the impacts of trauma, neglect and abuse on childhood development. We are committed to advocating for system and law reform that acknowledges these impacts and supports diversionary and therapeutic responses. We are committed to recognising children and young people as children first and foremost.

We address below the aspects of the recommendations in the areas we have expertise and responsibilities – youth crime and separate representation of children in out of home care.

Commission of Inquiry Recommendations

Youth Justice Priorities:

Recommendation 12.1- Closure of AYDC

TLA strongly supports the COI recommendation and the Government's decision to close Ashley Youth Detention Centre (AYDC). However, it is noted the initial intended closure date, which was the end of 2024, has now been extended and is unlikely to occur for a number of years. TLA recommends that AYDC be closed as soon as possible.

TLA welcomes the opportunity we have advocated for to deliver a duty lawyer service at AYDC . Our new service provides an additional layer of service and protection for children and young people in AYDC. The service is delivering free, face to face legal advice and representation for children and young people having received funding in the 2024-25 State Budget.

In the spirit of collaborative systems reform, TLA notes that the complexity and scope of youth justice matters, particularly of those for children and young people who are in detention, are rarely confined to the legal system. We are committed to working collaboratively with other service providers to get the best outcomes for children and young people who have contact with the justice system.

Recommendation 12.11- The Age of Criminal Responsibility

TLA has advocated frequently on the need to increase the age of criminal responsibility and supports the Government's commitment to do so. TLA holds that this must be prioritised, in line with the closure of AYDC and occur concurrently in Phase 2 of the Government's implementation of reforms and actions. It is currently planned for implementation in Phase 3—July 2029. In order to effectively reduce the number of children and young people coming into contact with the youth justice system and potentially entering detention, the age of criminal responsibility, and the age of detention, must be increased as soon as possible.

It is well established in neuroscience that the human brain does not fully develop until people are well into their 20s, meaning that children and young people have less capacity to understand the consequences of their actions and regulate their emotional responses. Pleasingly, it also means that they can change their behaviour. Children are more susceptible to peer pressure, influence, manipulation and exploitation, as well as much more likely to engage in risk taking behaviours. There is a myriad of reasons that children involved in the youth justice system should be treated differently than adults and most importantly not incarcerated.

Youth offending in Tasmania had been reducing over the past decade, and reducing the involvement of a young person in the justice system is mutually beneficial to children and the community—it reduces the number of victims of crime as well as being more cost effective. However, recently, there has been a significant increase in the rates of arrests of youths and the lodging of complaints. The impact of this is more children and young people are being exposed to the justice system and remaining there longer. This is evidenced by the increase in the youth justice backlog in the Magistrates Court (Youth Justice Division) which increased by 18.5 percent in 2022-23. The number of criminal complaints lodged in 2023-24 similarly increased by another 18.4 percent. (Source – Magistrates Court Annual Report 2022-23, 2023-24)

Fortunately, for most children, their contact with the youth justice system is for a brief period of time and limited in matters. However, a small number of children become entrenched in the youth justice system, reinforcing disadvantage and leading to poor long-term life outcomes.

TLA's Children First report drew on a decade of data to support advocating for the raising of the minimum age of criminal responsibility to 14 years old. Currently, in Tasmania a child as young as 10 years old can be charged with a criminal offence. Whilst the total number of children under 14 who are charged is small, this change would have a significant overall long-term benefit including children and young people being diverted from the justice system. The earlier that children are involved in the system, the more entrenched they become. Moreover, research indicates that children who become involved in the youth justice system before the age of 14 are more likely to become 'chronic adult offenders'[1]. This is also the case with respect to children and young people who are exposed to detention – with research finding that detention is damaging and criminogenic and results in young people being further entrenched in disadvantage. Similar studies have also found that the younger children receive their first sentence, the more likely they are to reoffend violently, more frequently and to receive a sentence of adult imprisonment before their 22nd birthday[3]. The majority of children who are charged with criminal offences are from disadvantaged backgrounds and have multiple and complex needs that would be more suitably addressed outside the criminal justice system.

TLA considers that the youth justice system must treat all children as children and recognise and respond to their individual circumstances. It must recognise the impacts of trauma and neglect on children's development. It must be therapeutically focussed. It must help stop the cycle of disadvantage experienced by those at risk of long-term engagement. Rehabilitation, education and support must be the focus, with punishment serving a secondary and more limited last resort function.

Recommendations 12.12, 12.15, 12.31, 12.32, 12.33- *Youth Justice Act* 1997 update

12.12: Phase 2- July 2026: updated principles of child development and children's needs

The *Youth Justice Act* 1997 is 25 years old and needs to be amended to reflect current scientific understanding about child development. Its principles should articulate the desire to divert children away from formal court-based legal proceedings and where possible, to take a trauma-informed approach and focus on rehabilitation strategies in order to minimise harm. A review of the law should be evidence-based and help connect children and their families to support services that can help address the root causes of offending behaviour. It would be an opportunity to provide for culturally appropriate and safe proceedings including for Aboriginal and Torres Strait Islander children, as in the case of the Koori Court in Victoria.

The current Youth Justice legislation principles focus on punishment, rather than rehabilitation. For example, nine out of ten of the principles in section 5(1) focus on sanctions, taking responsibility and punishment. The principle that children should be treated no more harshly than an adult is a good example of a focus in the current legislative principles that ignores the evidence about significant and critical differences in development of the human brain from child to adult. TLA

considers that this principle should be positively reframed to require that children are to be treated more leniently than adults.

While some of the current principles are important, such as any sanctioning of a youth is to be appropriate to the age, maturity and cultural identity of the youth; there is a heavy emphasis on sanction and punishment, rather than rehabilitation, restoration, and reintegration. TLA supports adoption of principles that recognise the systemic and multi-faceted failures that have led to children being before the youth justice system, and clearly articulate that the overriding consideration for youth justice is rehabilitation are important. They orientate the system towards rectifying problems and addressing the root causes of offending behaviour, rather than the behaviour alone.

12.15: Phase 3, July 2029: provides that rehabilitation is the primary purpose of sentencing a child.

TLA supports this position and also feels it should happen sooner than the scheduled implementation date (July 2026) and that it must occur concurrently with Recommendation 12.11. As discussed above, the *Youth Justice Act* 1997 is outdated and requires modernising to ensure that rehabilitation, rather than punitive measures, are prioritised.

Additionally, TLA suggests that this recommendation should also include the establishment of a specialist Children's Court in Tasmania to promote a consistent state-wide therapeutic approach. We also consider if a specialist children's court is established that critically it must provide for culturally appropriate and safe proceedings for Aboriginal and Torres Strait Islander children, similar to the successful Koori Courts in Victoria.

TLA also considers that notification of access to critical legal advice and services should be included as a mandatory positive requirement for every child and young person in amended or alternative provisions for the *Youth Justice Act* 1997. Section 24A states that a responsible adult be notified and then refers to Section 6 of the *Criminal Law (Detention and Interrogation) Act* .., which states that police must inform that a detainee can communicate with a friend or relative, and that they may communicate with a lawyer. The lack of a positive duty to ensure that that one of the most vulnerable groups of people due to their age and developmental immaturity, upon arrest and before questioning or investigation, receive legal advice, and have access to legal advice must also part of the implementation of recommendation 12.15.

12.31: Phase 2, July 2026: YJ Act expressly prohibits fully unclothed searches of children and young people

TLA strongly supports a comprehensive review of the current youth justice legislation, policies and procedures related to personal searches of children and young people in detention to ensure they are appropriate and safeguard the well-being of those detained. TLA supports the COI recommendations that fully unclothed searches should be prohibited and alternative methods, such as body scanner, should be utilised to ensure the safety and dignity of children and young people in detention.

12.32: Phase 2, July 2026: YJ Act to make clear that confining young people to their room constitutes isolation

TLA consider that isolative practices should only be used as a measure of last resort, and never as part of a punishment program for perceived or actual poor behaviour. This position is also in line with the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, that states that "all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including … place in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned".

Recommendation 12.14- Maximising bail opportunities for young people

Phase 3- July 2029

TLA is very supportive of this position and welcomes the opportunity to continue providing our Duty Lawyer Service into AYDC. While this service provides considerably capacity to address the bail issues experienced by children and young people in AYDC, access to bail supports are limited for other children and young people throughout the State. The Commission of Inquiry reported that absence of safe accommodation and support options were key reasons for children and young people being denied bail. We also know from the COI report and data that the number of children unsentenced or on remand is significantly higher than those serving a period of detention. Children in Tasmania are often refused bail because of problems with accommodation that are outside their control. Immediate efforts should be made to provide safe and secure housing for children so that no child is remanded because they are homeless or do not have a safe or secure address.

TLA supports the establishment of assisted bail programs to support young people in meeting bail conditions. We also support the establishment of 24-hour bail support service, noting the importance of such a service which could provide timely assistance and prevent unnecessary detention due to the unavailability of support afterhours. TLA has the expertise to contribute to this if resourced to do so – an experienced youth justice legal practitioner could be part of the support services offered with the aim of reducing and ideally preventing the unnecessary detention of young people.

Out of Home Care Priorities:

Recommendations 9.12, 9.16, 9.21, 9.26, 9.36

9.12 DECYP should ensure the Foster and Kinship Carers Handbook is updated

As part of the role of representing the best interests of children who are under a Care and Protection Order, a Separate Representative (SR) lawyer provided by Legal Aid will often talk with the foster carer to learn more about how the child is settling into the foster home, to explore the foster carer's ability to promote a relationship with the birth family when in the child's best

interests, and to gain an understanding of what support is needed for the child[1]. It is the foster carer who can offer a unique insight into the child's day-to-day life and any challenges that the child faces. In those conversations, foster carers often have limited information provided to them about the court process and about the intended path forward for the child. TLA supports updates to the Handbook which would ensure that the information made available to a foster carer is consistent and updated in accordance with any relevant changes to policy. This in turn may assist with the recruitment and retention of foster carers.

9.16 DECYP should ensure all children in care, including on guardianship orders until age 18, have a case manager

In December 2022, the Children's Commissioner for Tasmania carried out an own motion investigation into the change to case management of children and young people in care. The concern was that the case management of children in out of home care was to move from a dedicated Child Safety Officer working one on one with the child or young person to a team approach within the Child Safety Service.

The Commissioner's report[2] outlined the impact on the child's right to participate in decisions that affect them which is fundamental to their safety. The children and young people affected by the change in case management indicated that their voice felt lost, they felt sadness, and they felt frustration. In speaking with children in care as their Separate Representative (SR), TLA's experience from our inhouse SRs is that they receive the same message from the children they represent. In many cases, the child or young person had worked with the same Child Safety Officer over a lengthy period, building a rapport which enabled them to feel safe in raising any concerns that they had. For some, the Child Safety Officer was the only consistent person in their life and for that person to be replaced by a team of new workers was negatively impactful.

In many cases, once a long-term Care and Protection Order is made, the role of the SR ends, which takes away an opportunity for the child or young person to raise their concerns with someone who is "on their side". The importance of the Child Safety Officer cannot be overstated and to ensure the participation of children and young people in their Care Plan, a case manager is needed for each child or young person. The out of home care system must actively nurture and support children to help them reach their full potential in life.

9.21 DECYP make publicly available the criteria and process for a carer to become a third party guardian

The process for becoming a carer and guardian of a child or young person in the out of home care system is unclear, as are the training criteria, remuneration and processes for maintaining

[1] See Practice Standard 3 of TLA Separate Representative Practice Standards and Guidelines: Talking to the child's kinship or foster carer Information for lawyers - Tasmania Legal Aid (Civil Law: Sep Rep Practice Standards & Guidelines).

[2] Commissioner for Children and Young People (Tas) 2023 A Place at the Table: An investigation into a change to the case management of children and young people in care in Tasmania.

accreditation as such. These requirements are designed to ensure that carers and guardians remain suitable and qualified for the role, safeguarding the well-being of children and young people that they are responsible for, and should be publicly available, with a well understood accountability framework established.

Part of the accountability framework, as well as requirements for maintaining accreditation as a carer should in our view include training in trauma-informed practice.

9.26 DECYP should ensure that each child is involved in developing their care plan

Every child has a right to participate in decision-making processes that affect them as it has a significant bearing on whether that child feels understood, valued and believed. Article 12 of the UN Convention on the Rights of the Child provides that children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account. For a child in out of home care, this provides them with some ownership over their life, and any decision that needs to be made in their best interests is more likely to be accepted by the child if they feel heard, even when the ultimate decision that is made might not be the one that they indicated they wanted. TLA strongly supports a model where each child is involved in developing their care plan and any changes to it, throughout the time that they are in out of home care.

9.36 *The Tasmanian Government should introduce legislation to expand the jurisdiction of the Tasmanian Civil and Administrative Tribunal to include review of decisions of the Department for Education, Children and Young People in exercising its custody or guardianship powers – including decisions about where a child should live and arrangements for the child's care.*

Applications for Care and Protection Orders are heard by a Magistrate exercising jurisdiction under the *Children, Young Persons and Their Families Act 1997 (Tas)*. An Order will include provision for custody and guardianship but will rarely include any further detail as to how these roles are to be exercised. If a dispute arises about where a child is to live (for example), decision making currently occurs at the Care Team level and rarely does TLA see any further application brought before the Magistrates Court. The court lists in the Magistrates Court are congested, and to have a review mechanism available through a jurisdiction such as the Tasmanian Civil and Administrative Tribunal would, in our view, offer independent oversight of disputes and a more streamlined and timely review of the decisions. Consideration would need to be given as to who could bring the application for review, and whether in the circumstances the best interests of the child or young person and their ability to participate would require the re-appointment of a Separate Representative lawyer when one is not still in place.

Recommendation 17.1- Ensuring victim-survivors have access to a redress scheme to provide compensation and support for child sexual abuse

Tasmanian Victim-Survivors of Child Abuse Legal (TasVOCAL) was launched in August 2024 by TLA with funding from Government after the Commission of Inquiry identified the need for better access to justice for people who, as children, experienced abuse in institutional settings.

For most survivors who have been failed by institutions in the past, it takes enormous courage to begin this legal process. We also know that many survivors are fearful of police, lawyers and social workers because these services are often connected to their past traumas.

TasVOCAL aims to make the process easier for survivors and help them understand their rights and the legal redress options open to them including obtaining a meaningful apology.

Once a person has considered their options, TasVOCAL can accompany them to attend with an appropriate specialist and prepare a brief that prevents the person having to recount their story over and over again.

This recommendation has been successfully implemented and TasVOCAL has assisted many people statewide to access redress and compensation processes.

The recent change to the National Redress Scheme access requirements recommended by the Commission of Inquiry (recommendation 17.1- 2b) to include people serving prison sentences for 5 years or longer is welcomed by TLA to enable more victim-survivors to access the scheme.

Thank you for the opportunity to provide a submission on progress on the implementation of the 191 recommendations made in the Commission of Inquiry's Final Report in our capacity as an organisation with experience and responsibility for delivery of legal services relating to the implementation of the Report's recommendations.